Supreme Court, U.S.
FILED

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No. ____

In the Supreme Court of the United States

JERRY R. PIKE, PATRICK A. THOMAS,
Individually and on behalf of others
similarly situated,

Petitioners,

v.

LUCENT TECHNOLOGIES, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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72 pp

QUESTIONS PRESENTED

1. Where a plaintiff alleges intentional discrimination in employment, must summary judgment be entered for the employer unless the plaintiff can either

    a. adduce "direct evidence" of discrimination, or

    b. offer evidence showing that the employer's proffered legitimate explanation for its actions is false?

2. Under the Age Discrimination in Employment Act (the "ADEA"), plaintiffs may bring related claims in a single action and the district may permit a defined class of additional plaintiffs to join the case after it has been filed. A case in which this procedure occurs is known as a "collective" ADEA action. In order for an ADEA case to proceed as a collective action, must each original plaintiff file, at the start of the case, a separate "consent to be a party plaintiff" in addition to the complaint?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are Jerry R. Pike and Patrick A. Thomas, as well as a potential class of all those "similarly situated," within the meaning of 29 U.S.C. § 216(b). That class could, at its broadest probable definition, consist of all management employees of Lucent Technologies over the age of 40 who allege they were subjected to an adverse employment decision in 1999 or 2000 as a result of a forced ranking entitled the "Lucent Talent Review."

Respondent

Respondent is Lucent Technologies, Inc., a publicly traded corporation. Petitioners are unaware of any publicly traded company that owns ten percent or more of respondent's stock.

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the Eleventh Circuit Court of Appeals in this case.

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OPINIONS BELOW

The Eleventh Circuit's order denying the timely petition for rehearing and reconsideration en banc is at App. 1a-2a. The Eleventh Circuit panel decision is at App. 3a-8a. The two district court decisions are at App. 9a-39a and 40a-48a. The panel decision and the district court decisions are unreported.

JURISDICTION

The Eleventh Circuit panel decision was issued March 14, 2003. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing en banc on May 8, 2003.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners brought this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA"), and under state age discrimination laws. Petitioners, who had both been long-term employees of respondent and its predecessors, alleged that they were removed from their positions "because of age," within the meaning of the ADEA, 29 U.S.C. § 623(a)(1).

After extensive discovery, respondent moved for summary judgment. In its order on the summary judgment motion, the district court held that petitioners "offer circumstantial evidence that could support an inference of intentional discrimination." App. 30a. It summarized the evidence it found particularly probative of discriminatory intent this way:

> Plaintiffs offer circumstantial evidence that could support an inference of intentional discrimination in the Talent Assessment process and its aftermath. First, there is evidence in the record that top Lucent officials viewed the talent review process as an opportunity to "refresh" the sales force or "refresh the business." In addition, Plaintiffs offer more than one statement by Steven Russell indicating an age bias. These statements include: (1) a statement that he needed "young, ex-military officers;" and (2) a statement in a memorandum that he was "looking to bring on a couple of young, hungry, and smart people leaving military service... to move them into AE vacancies as soon as possible" and make them "the nucleus of a new AE breed." Next, some of Lucent's employees involved in the Talent Assessment indicated that Defendant was looking for younger people and that Steven Russell wanted to surround himself with younger people, Third, written comments about employees often listed youth as a positive characteristic. Plaintiffs also point out that the Talent Review Forms did not contain any objective measures of performance but called on the evaluators to rate the employees' "ability to develop and adapt." Lucent also encouraged the recruitment of recent college graduates because of their flexibility and skill. Finally, Plaintiffs offer statistical evidence that could indicate disparate treatment of employees more than forty-seven or fifty years of age.

App. 30a-31a (record citations omitted).

The district court reiterated that the record evidence created an inference of intentional discrimination:

> The Court notes that the evidence offered by Plaintiffs could support an inference of intentional discrimination.

App. 31a.

Nevertheless, the district court then held that it was bound by Eleventh Circuit precedent to grant summary judgment unless the petitioners also offered additional evidence proving that the non-discriminatory reasons advanced by respondent to explain its treatment of petitioners "did not actually motivate the employer's conduct":

> [T]he ageist comments and statistical evidence in combination were enough to establish Plaintiffs' prima facie case, but, once Defendant has offered legitimate nondiscriminatory reasons for its actions, Plaintiffs must produce additional evidence to show that these reasons did not actually motivate the employer's conduct. The assertions that the Talent Assessment process were [sic] standardless, that the evaluations were manipulated to match the decisions that had been made, that ageist comments had been made, and that statistics could support a finding of discrimination against those employees over forty-seven is not enough to satisfy Plaintiffs [sic] burden of showing pretext.

App. 35a. The court ruled that summary judgment was required because the plaintiffs were unable to show that respondent's explanation necessarily was false. App. 36a-37a.

The district court also addressed the one other way that Eleventh Circuit law would have permitted petitioners to

avoid summary judgment: if they possessed "direct evidence" of discriminatory motive. App. 20a. The district court invoked the stringent, three-part test for "direct evidence" in the Eleventh Circuit. The court held that, to constitute "direct evidence," a statement:

a. must be made by a person involved in the challenged decision;

b. must reflect a discriminatory attitude so blatantly that the only intent could be to discriminate on the basis of age; and

c. must be tied to the adverse employment actions at issue.

App. 20a-25a. The district court held that none of the record evidence met this test for "direct evidence." Id.

The Eleventh Circuit affirmed. Seconding the district court, it held that petitioners could not survive summary judgment without either (a) "direct evidence" of discriminatory motive or (b) evidence showing respondent's explanation to be "false." App. 4a-7a.

The ADEA allows what are known as "collective" actions. In a collective ADEA case, numerous plaintiffs assert related claims in a single civil action; in addition, after the case has begun the district court has the authority to define a class of additional plaintiffs whom it deems to be "similarly situated," and allow them to join the case. Several months prior to granting summary judgment on petitioners' individual claims, the district court ruled that this case could not proceed as a collective action. The court permitted the plaintiffs to continue litigating their own claims, but held it would not

allow additional plaintiffs into the case. The court held that petitioners were not entitled to litigate a collective ADEA case because, when they filed the complaint, they did not also file consent forms, stating that they (the petitioners) agreed to be plaintiffs. App. 40a-47a. The Court of Appeals affirmed this ruling. App. 7a-8a.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S STANDARD FOR SUMMARY JUDGMENT IN AN EMPLOYMENT DISCRIMINATION CASE IS INCONSISTENT WITH THE DECISIONS OF THIS COURT

This Court's splintered decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), spawned a large number of lower court decisions requiring in various circumstances that an employment discrimination plaintiff adduce "direct evidence" of discrimination. In Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003), this Court rejected one line of such direct evidence cases, holding that direct evidence is not required in a Title VII action to shift to the defendant the burden of proof regarding causation in a mixed-motive case. 123 S. Ct. at 2153-55. The Eleventh Circuit decision in the instant case--issued before and without the benefit of this Court's decision in Desert Palace--presents an even more extreme "direct evidence" rule.

The decision below applies well established Eleventh Circuit precedent. Under the controlling standard in that circuit, an employment discrimination plaintiff alleging intentional discrimination cannot survive a motion for summary judgment unless he or she can either (a) adduce substantial evidence that the employer's proffered explanation for the action in question is "false", (App. 6a; see App. 35a),

or (b) offer "direct evidence" that the employer acted with an impermissible motive. (App. 20a-25a). As we explain below, the combined effect of these rules is to require "direct evidence" in any case involving multiple motives, and thus to largely preclude such mixed motive cases from surviving to trial.

A. The Eleventh Circuit's Falsity Requirement Cannot, by Definition, Be Satisfied in A Mixed Motive Case

Of the two methods permitted by the Eleventh Circuit to prove intentional discrimination, one requires that the plaintiff prove that an employer's proffered explanation is "false". (App. 5a). The "employee must meet [the employer's] reason head on and rebut it." (App. 5a, quoting Chapman v. AI Transportation, 229 F. 3d 1012, 1030 (11th Cir 2000)(en banc)).

The specific and demanding elements of this "falsity" method of proof have been repeatedly articulated by Eleventh Circuit decisions. Tidwell v. Carter Products, 135 F. 3d 1422, 1426 (11th Cir. 1998)(plaintiff's must produce evidence "discrediting the employer's proffered reasons")(ADEA); Evans v. McClain of Georgia, Inc., 131 F. 3d 957, 964 (11th Cir. 1997)(plaintiff must adduce evidence "as to the truth or falsity of the employer's legitimate, discriminatory reasons")(Title VII); Combs v. Plantation Patterns, 106 F. 3d 1519, 1529 (plaintiff's evidence must call into question "the truth of each of the employer's proffered reasons"), 1540 (plaintiff must show that proffered explanation "was not a factor that actually motivated" the employer), 1541 (same)(11th Cir. 1997)(Title VII); Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F. 3d 436, 440-41 (11th Cir. 1996)(plaintiff must show that the employer's proffered

reason "was false and that discrimination was the real reason")(ADEA); Cooper-Houston v. Southern Ry. Co., 37 F. 3d 603, 605 (11th Cir. 1994)(plaintiff must adduce evidence that the employer's proffered reasons "were not what actually motivated its conduct.")(Title VII).

This method of proof is certainly a permissible manner of demonstrating the existence of a discriminatory intent. But the utility of this methodology is by definition subject to a serious, often critical, limitation. If a case involves multiple motives, at least one of which is legitimate, the plaintiff necessarily will not be able to prove that all of the employer's proffered explanations were false, or that none of those legitimate explanations were "motivating factors." To the contrary, a mixed motive case is by definition a case in which at least one legitimate explanation is true, and in which at least one such explanation indeed played a motivating role in the disputed action. Thus the very nature of a mixed motive case precludes a plaintiff from using the falsity method of proof.

This inherent unavailability of the "falsity" method of proof in mixed motive cases is of great practical importance. The Congress which adopted the 1991 Civil Rights Act believed that the vast majority of intentional discrimination cases involve just such mixed motives. The House Report, relying in part on the views of the Department of Justice, emphasized that the impact of Price Waterhouse

> is particularly profound because the factual situation at issue in Price Waterhouse is a common one. As the Justice Department correctly observed, "[v]irtually every Title VII disparate treatment case will to some degree entail multiple motives." Brief for the United States as Amicus Curiae.

H.R. Rep. No. 102-40(I), p. 41; S. Rep. No. 101-315, p. 16. In Desert Palace the Chamber of Commerce of the United States made the same point, stressing that "[e]mployment decisions . . . are almost always mixed-motive decisions turning on many factors." Brief Amicus Curiae of the Equal Employment Advisory Council and the Chamber of Commerce of the United States, No. 02-679, p. 20; see id. at 21 (multiple motives are present in "virtually every discrimination case.")

In this case, as in most, this inherent limitation on the falsity standard was fatal to plaintiff's effort to invoke that method of proof. The District Court repeatedly concluded that the plaintiffs' evidence "could support an inference of intentional discrimination." (App. 30a, 31a). But under Eleventh Circuit precedent that simply was not sufficient. To invoke the falsity method of proof, the plaintiff was obligated to "produce additional evidence to show that these [proffered legitimate] reasons did not actually motivate the employer's conduct." (App. 35a-36a)(Emphasis added); see id. at 35a (plaintiff must show "that the employer's reasons did not in truth motivate his conduct.") That showing by definition could not be made in a case involving multiple motives. Thus the falsity method of proof required a demonstration that this was one of the rare cases involving only a single motive. Here, as in most cases, evidence precluding the possible existence of multiple motives could not be adduced.

B. The Decision Below Requires Proof of "Direct Evidence" of Discrimination in Any Mixed Motive Case

In a mixed-motive case, the falsity method of proof is not available. The only alternative method of proof permitted by the Eleventh Circuit is "direct evidence."

The Eleventh Circuit "direct evidence" requirement is far more draconian than the direct evidence rule rejected in Desert Palace. The decisions overturned by this Court in Desert Palace had only required a plaintiff to adduce direct evidence if he or she wished to shift to the defendant the burden of proof regarding causation. But the absence of direct evidence was not fatal to the claims of a plaintiff in a mixed motive case. Even under those now-disapproved decisions, a plaintiff who lacked direct evidence could still rely on other types of evidence to establish the existence of an impermissible motive and to show causation.

In the Eleventh Circuit, however, the absence of direct evidence is necessarily fatal in a mixed motive case. Where a plaintiff cannot establish falsity, an approach impossible where mixed motives are present, the only method of proof that remains in the Eleventh Circuit is "direct evidence." Absent direct evidence, the issue of causation would not even arise in the Eleventh Circuit, because there would be no way to prove the existence of an impermissible motive.

The Eleventh Circuit's formulation of what constitutes "direct evidence" is essentially the same narrowly restricted definition unsuccessfully proposed by the employer in Desert Palace.[1] To satisfy the Eleventh Circuit's direct evidence requirement, a plaintiff must offer evidence of statements by the very person who made the disputed decision, the statements must be utterly unambiguous in announcing a discriminatory motive, and that motive must be directly

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[1] Brief of Petitioner, Desert Palace, Inc. v. Costa, p. 40-41, 42 ("[E]vidence is "direct"....when it consists of [1] statements by a decisionmaker [2] that directly reflect the alleged animus and [3] bear squarely on the contested employment decision....").

connected to the very employment action at issue in the case.[2] That was the exceedingly demanding standard applied by the district court (App. 20a-26a), urged by the employer on appeal[3], and invoked by the court of appeals. (App. 4a-5a).

The Eleventh Circuit has candidly acknowledged that even in cases of unlawful discrimination it will only rarely be possible to find such direct evidence. Merritt v. Dillard Paper Co., 120 F.3d 1181, 1191 (11th Cir. 1997)("The present case is the exception, the rare case where there is direct evidence of retaliatory motive"); Rollins v. TechSOUTH, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987)("It is rare that direct evidence of discrimination exists"); Perryman v. Johnson Products Co, Inc., 698 F.2d 1138, 1143 (11th Cir. 1983)("[S]ome plaintiffs are able to prove the existence of discriminatory intent by direct evidence; in these rare cases, . . . a presumption is created that the adverse employment

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[2] Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318, 133. (11th Cir. 1998); Carter v. Three Springs Residential Treatment, 132 F.3d 635, 642 (11th Cir. 1998); Burrell v. Board of Trustees of Georgia Military College, 125 F.3d 1390, 1393-94 (11th Cir. 1997).

[3] Brief of Appellee, Pike v. Lucent Technologies, Inc., No. 02-14878AA, p.27 ("'Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption.' Standard v. A.B.E.L. Svcs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). '[R]emarks by non-decision makers or remarks unrelated to the decision-making process itself are not direct evidence of discrimination.' Id. In addition, comments which are open to more than one interpretation or which require the court to take an additional inferential step do not constitute direct evidence.")

action taken against the plaintiff was a product of that discriminatory intent").

C. The Decision Below Is Inconsistent With The Decisions of This Court in Desert Palace, Inc. v. Costa, 123 S. Ct. 2146 (2003), and in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The Eleventh Circuit's insistence that a plaintiff adduce "direct evidence" in a mixed motive case is squarely inconsistent with the reasoning of this Court's subsequent decision in Desert Palace. Even where a plaintiff cannot show falsity, there is a wide range of circumstantial evidence short of "direct evidence" (however it might be defined) that would be sufficient to demonstrate the presence of an impermissible motive. The Eleventh Circuit's requirement that a plaintiff must either demonstrate falsity or adduce "direct evidence" precludes proof of discrimination by reliance, instead, on such other types of proof.

Desert Palace emphatically rejected treating direct evidence differently from other types of evidence; such a requirement, the Court explained, is an unjustifiable departure from the "[c]onventional rul[e] of civil litigation." 123 S. Ct. at 2154, quoting Price Waterhouse, 490 U.S. at 253 (plurality opinion).

> That rule requires a plaintiff to prove his case "by a preponderance of the evidence," ibid., using "direct or circumstantial evidence." Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714 n. 3 (1983). We have often acknowledged the utility of circumstantial evidence in discrimination cases. . . . The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17 (1957). . . . [N]either petitioner nor its amici curiae can point to any other circumstance in which we have restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute.

123 S. Ct. at 2154. In mixed-motive cases the Eleventh Circuit imposes precisely the type of restriction rejected by this Court in Desert Palace.

If applied to the circumstances of Desert Palace itself, the Eleventh Circuit standard would have required entry of judgment as a matter of law in favor of the employer in that case. The jury verdict in Desert Palace concluded, not only that gender was a motivating factor, but also that the defendant's "treatment of plaintiff was motivated by . . . a lawful reason." (No. 02-679, App. 40). That verdict meant that the explanation proffered by Desert Palace (that Costa was involved in a physical confrontation and that she had a prior disciplinary record) was true, and was a motivating factor. In the Eleventh Circuit such a verdict would have been fatal to Costa's claim, because the verdict precluded use of the falsity method of proof, and because Costa did not have the sort of "direct evidence" required by the Eleventh Circuit.

The Eleventh Circuit decision is in practice equally inconsistent with all of the opinions in Price Waterhouse. In a mixed motive case, a plaintiff (by definition) cannot prove that some legitimate factor was neither present nor a motivating consideration, and (as the Eleventh Circuit itself acknowledges) the plaintiff will only rarely be able to adduce "direct evidence." Thus in most mixed motive cases it would

as a practical matter be impossible under the Eleventh Circuit standard to defeat a motion for summary judgment. Where an employer would not have taken a disputed adverse action but for the existence of a discriminatory purpose, each of the opinions in Price Waterhouse agreed that that employer's conduct was unlawful, regardless of whether some other legitimate motive was also present. Price Waterhouse v. Hopkins, 490 U.S. at 241 (plurality opinion), 259 (concurring opinion of Justice White), 278 (concurring opinion of Justice O'Connor), 284 (dissenting opinion of Justice Kennedy). But under the decisions of the Eleventh Circuit, the presence of that legitimate motive (because it precludes use of the falsity method) often makes proof of such illegality impossible.

II. THERE EXISTS A SPLIT IN THE CIRCUITS AS TO WHETHER PLAINTIFFS MUST FILE A CONSENT FORM IN ADDITION TO THE COMPLAINT IN ORDER TO LITIGATE A "COLLECTIVE" ADEA ACTION.

The ADEA allows what are known as "collective" actions. In a collective ADEA case, numerous plaintiffs assert related claims in a single civil action; in addition, after the case has begun the district court has the authority to define a class of additional plaintiffs whom it deems to be "similarly situated," and allow them to join the case. This Court has specifically approved this procedure, holding that Congressional policy favors the collective litigation of age discrimination claims:

> The ADEA . . . . expressly authorizes employees to bring collective age discrimination actions "in behalf of ... themselves and other employees similarly situated." 29 U.S.C. § 216(b) (1982 ed.). Congress has stated its policy that ADEA plaintiffs should have

the opportunity to proceed collectively.

Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989).

The district court ruled that additional plaintiffs could not join the case because petitioners, when they filed the complaint, did not also file consent forms, stating that they (the petitioners) agreed to be plaintiffs. App. 40a-47a. The Court of Appeals affirmed this ruling, holding the consents were required under a previous Eleventh Circuit decision, Grayson v. Kmart Corp., 79 F.3d 1086, 1106 (11th Cir. 1996). App. 7a-8a.

The Eleventh Circuit is the only circuit to require the filing of consents in order to proceed with a collective ADEA action.[4] At one point, this view was shared by the Eighth

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[4] The procedural device of requiring both a complaint and separate consents is found in the Fair Labor Standards Act (the "FLSA"). The FLSA contains a provision, found at 29 U.S.C. § 256, which requires the consents in overtime and minimum wage cases. It states,

> In determining when an action is commenced for the purposes of section 255 of this title, an action . . . shall be considered commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act . . ., it shall be considered to be commenced in the case of any individual claimant –
>
> (a) on the date when the complaint . . . . and his written consent to become a party petitioner is filed.

The ADEA expressly incorporates several, but not all, procedural

Circuit. O'Connell v. Champion International Corp., 812 F.2d 393 (8th Cir. 1987). The Eight Circuit, however, has since held that the requirement was eliminated as a result of the Civil Rights Act of 1991. Anderson v. Unisys Corp., 47 F.3d 302, 308-09 (8th Cir. 1995). The Third Circuit and a number of district courts have always held that separate consents are not required. Sperling v. Hoffman-LaRoche, Inc., 24 F.3d 463, 467 (3d Cir. 1994); see In re: Western District Xerox Litigation, 850 F. Supp. 1079 (W.D.N.Y. 1994).

The Eleventh Circuit rule serves no practical purpose and advances no public policy. By imposing a formality that is nowhere required by the statutory language of the ADEA, it lays a trap for the unwary and undermines Congress' determination "that ADEA plaintiffs should have the opportunity to proceed collectively." Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. at 170.

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provisions of the FLSA. Section 256, quoted immediately above, is not among those portions of the FLSA that are incorporated by the ADEA. The provisions of the FLSA that are expressly incorporated by the ADEA are listed in 29 U.S.C. § 626. The Court of Appeals held that section 256 is nevertheless impliedly incorporated into the ADEA. App. 7a-8a.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the court of appeals. In the alternative, the Court should grant the writ, vacate the decision below, and remand the case for further consideration in light of Desert Palace, Inc. v. Costa.

Respectfully Submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-14878-AA

[Filed May 8, 2003]

JERRY R. PIKE, PATRICK A. THOMAS, Individually and on behalf of others similarly situated,	)
Plaintiffs-Appellants,	)
versus	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant-Appellee.	)

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, F.2d ___) .

Before: TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14878
Non-Argument Calendar

D.C. Docket No. 00-01406-CV-RWS-1

[Filed March 14, 2003]

JERRY R. PIKE, PATRICK A. THOMAS Individually and on behalf of others similarly situated,	)
Plaintiffs-Appellants,	)
versus	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, BIRCH and HULL, Circuit Judges.

PER CURIAM:

Jerry Pike and Patrick Thomas ("the plaintiffs") appeal the district court's grant of summary judgment to Lucent Technologies ("Lucent") on their age discrimination claims, filed pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621-34. They challenge two of the district court's decisions with regard to summary judgment: (1) the district court's ruling that the plaintiffs did not present direct evidence of discrimination, and (2) the district court's ruling that the plaintiffs failed to present sufficient evidence to rebut Lucent's proffered reasons as pretextual. The plaintiffs also appeal the district court's order dismissing their collective action claims. After review, we affirm.[1]

I. SUMMARY JUDGMENT

First, we find no merit to the plaintiffs' assertion that they presented direct evidence of discrimination in the form of statements made by two Lucent managers, Craig Hixon and Steven Russell. Hixon's "old bug", comment does not constitute direct evidence of discrimination because he was not a decisionmaker involved in the challenged decisions. See Trotter v. Bd. of Trustees, 91 F.3d 1449, 1453-54 (11thCir. 1996) ("For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision."). Russell's comments stating a desire to attract younger employees, while perhaps circumstantial evidence of Russell's age bias, do not amount to direct evidence because his comments still require

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[1] This Court reviews a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the party opposing the motion. See Patrick v. Floyd Med. Ctr., 201 F.3d 1313, 1315 (11th Cir. 2000).

the factfinder to infer that Russell's preference for younger employees motivated the decisions to rank both plaintiffs in the bottom 10% of the company's sales team in the Talent Assessment, to transfer Thomas, and to terminate Pike. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1359 (11th Cir. 1999) (holding that decisionmaker's comment that the company needed to promote "aggressive young men" was not direct evidence of age discrimination).[2]

Second, with regard to pretext, the plaintiffs failed to rebut "head on" Lucent's legitimate, nondiscriminatory reasons for their actions, namely that Lucent's managers believed that the plaintiffs compared unfavorably in certain areas to other sales team members. See Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc) ("Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.").[3] The

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[2] This Court has concluded that statements praising the young, when coupled with derogatory remarks about older workers, Buckley v. Hosp. Corp. of Am., Inc., 758 F.2d 1525, 1530 (11th Cir. 1985), and derogatory statements about protected workers alone, Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999), can be direct evidence of a discriminatory motive, but there is no evidence that Russell made derogatory statements about older workers.

[3] This is also true of Pike's discharge as part of a reduction in force. Lucent managers chose to terminate Pike over the other sales team member from the South Florida office, Rick Gomez. Pike failed to present evidence that he had more ONG knowledge or better client relations with BellSouth than Gomez, the reasons

record reflects that both plaintiffs consistently received good performance evaluations and praise from their managers. However, there is no evidence of the performance evaluations and feedback of other sales teams members. Thus, the evidence of the plaintiffs' evaluations is insufficient to show that the plaintiffs compared favorably to other sales team members in these areas in order to conclude that Lucent's reason was false.[4]

Finally, we reject the plaintiffs contention that the district court held them to a higher burden of proof of pretext than that required by the McDonnell Douglas framework. The district court did not discount or exclude the plaintiffs' evidence from their prima facie case when considering whether the plaintiffs had presented sufficient evidence to find

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specifically relied upon by the managers who decided to discharge Pike rather than Gomez.

[4] Pike submitted evidence suggesting that he was superior to other account executives in that he was on target to meet or exceed a higher percentage of his mid-1999 year goals than any other account executive. However, for an inference of discrimination to arise, the plaintiff must make a strong showing of disparity in qualifications. Denny v. City of Albany, 247 F.3d 1172, 1187 (11th Cir. 2001). Even taking as fact that Pike was on target to reach a higher percentage of his goals than any other account executive, he still failed to make a strong showing of a disparity in qualifications. The Talent Assessment conducted by Lucent's C-level managers was not based strictly on the current production numbers, but took into account all the information the managers knew. Therefore, Pike would have had to show that his production numbers had been higher for a considerable period of time, not just the limited mid-1999 time period.

pretext. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (noting that, although the presumption of discrimination that arises from the prima facie case falls away when the defendant meets its burden of producing a legitimate, nondiscriminatory reason, the factfinder may still consider the evidence establishing the plaintiff s prima facie case on the issue of pretext). Instead, the district Court merely found that this evidence, though sufficient to establish the prima facie case, was not sufficient to permit a reasonable jury to find pretext.

II. DISMISSAL OF COLLECTIVE ACTION

The plaintiffs argue that the district court erroneously dismissed their collective action claims for failure to file written consent to become a party plaintiff within ninety days of receiving their right to sue letter from the EEOC, as required by 29 U.S.C. § 256. The plaintiffs contend that § 256 is inapplicable to ADEA claims after the passage of the Civil Rights Act of 1991 ("CRA"), Pub. L. No. 102-166, § 115, 105 Stat. 1071 (1991). After review, we conclude that the district court properly dismissed the plaintiffs' collective action claims.[5]

This Court has previously stated that "[t]he legislative history of both § 216(b) and the ADEA show that Congress meant for ADEA actions to be governed by the tolling principle of § 256 of the FLSA." Grayson v. Kmart Corp., 79

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[5] This Court reviews de novo a grant of a motion to dismiss under 12(b)(6) for failure to state a claim. See Shands Teaching Hosp. & Clinics. Inc. v. Beech St. Corp., 208 F.3d 1308, 1310 (11th Cir. 2000).

F.3d 1086, 1106 (11th Cir. 1996). Pursuant to § 256, a collective action is commenced when a named plaintiff files both a complaint and a written consent to become a party plaintiff. 29 U.S.C. § 256(a).

Plaintiffs assert that Grayson is limited to only pre-CRA ADEA claims. We disagree. In a footnote, Grayson limits to pre-CRA claims its specific holding that a putative plaintiff must opt-in by filing his or her written consent before the statute of limitations on the ADEA claim expires. However, this is due to the fact that the CRA replaced the former two- and three-year statutes of limitations found in the Fair Labor Standards Act, 29 U.S.C. § 255, and originally applicable to ADEA claims, with a ninety-day period following the EEOC right to sue notice within which to begin an ADEA action. The CRA did not change the procedure for commencing a class or collective action under the ADEA. See Grayson, 79 F.3d at 1107 n.39. This Court's overall conclusion that § 256, and not Rule 23, governs ADEA collective action claims was not affected by the CRA. Therefore, because Plaintiffs failed to file written consents to become party plaintiffs, they failed to satisfy the statutory requirement necessary to prosecute a collective action and the district court did not err in dismissing their collective action claims.

III. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in granting summary judgment or dismissing the plaintiffs' collective action claims.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1 00-CV- 1406-RWS

[Filed August 23, 2002]

JERRY R. PIKE and PATRICK A. THOMAS, Individually and on behalf of others similarly situated,	)
Plaintiffs,	)
v.	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant.	)

ORDER

Plaintiffs bring this action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., ("the ADEA") and under state age discrimination laws. According to Plaintiffs, they were victims of a purge of older managers by Defendant. Now, before the Court for consideration are Defendant's Motion for Summary Judgment on Plaintiff Thomas' Claims [41-1], Defendant's Motion for Summary

Judgment on Plaintiff Pike's Claims [42-1], Defendant's Motion To Strike Supplemental Report of Dr. John Miller [52-1], Defendant's Motion for Reimbursement of Costs for Expert Databases [57-1], and Plaintiffs' Motion To Strike Defendant's Reply to Plaintiffs' Joint Statement of Material Facts [62-1]. After extensively reviewing the record and carefully considering the arguments of the parties, the Court enters the following Order.

FACTUAL BACKGROUND

The following facts are undisputed. Lucent Technologies, Inc. ("Lucent") is a corporation that manufactures and sells telecommunications equipment and provides related services to companies in the industry. In 1987, Plaintiff Pike became a sales account executive on Lucent's BellSouth Customer Team ("BSCT") in West Palm Beach, Florida. In 1990, Plaintiff Thomas became a sales account executive on Lucent's BSCT in Louisville, Kentucky. The BSCT and BellSouth were both headquartered in Atlanta. Plaintiffs Pike, Thomas, and the other account executives located outside headquarters were referred to as "field sales" account executives. These field sales account executives were expected to sell Lucent products to the network planners, construction personnel, and engineers in their assigned markets. The BSCT account executives were categorized into groups such as the Network Products Group ("NPG") and the Optical Networks Group ("ONG") according to the type of products they sold. In the 1990s, BellSouth began to shift its focus to the optical network products because they were more technically sophisticated and could carry a greater amount of information at a greater speed than the network products.

When Pike became a BSCT account executive, he primarily was responsible for selling NPG products in southern Florida. At the time, Dave Collins supervised Pike, and he remained Pike's supervisor for more than two years. Evidence in the record indicates that Collins was disappointed by Pike's performance, but Plaintiff Pike points out that there is no documentation of Collins' concerns. In addition, Pike says that Collins admitted that he did not have problems with Pike's performance.

In November 1998, George Dunlap replaced Collins as Pike's supervisor. According to Dunlap, Collins met with Dunlap to discuss the performance of the account executives and Collins gave Pike a low rating, citing several specific reasons. Pike submits that this meeting between Dunlap and Collins never occurred and that Collins never indicated that he was displeased with Pike's performance.

When Plaintiff Thomas became a BSCT account executive; he was responsible for selling NPG products in Kentucky. In 1996, Thomas assumed responsibility for ONG sales in Kentucky. At that time, Thomas was under the, supervision of Dennis Beck. Lucent provided training about ONG products, but the parties dispute whether Thomas ever became sufficiently familiar with these products to sell them effectively. The parties also disagree about whether Thomas' supervisors informed Thomas that his knowledge of ONG products was lacking. In 1997, George Dunlap became the sales manager in charge of Kentucky and Thomas' supervisor. While Defendant asserts that Mr. Beck discussed the account executives' performance with Mr. Dunlap, Plaintiff Thomas disputes this statement. According to Thomas, the evidence

does not support Defendant's contention that Thomas performed poorly.

In August 1998, Steven Russell became the Sales Vice President responsible for the BSCT. Shortly after he received this position, the BSCT sales managers met with Russell and discussed the performance of the account executives. There is evidence in the record to indicate that Dunlap characterized Plaintiffs Pike and Thomas as his weakest account executives. However, Pike argues that Dunlap had too little experience with Pike to characterize his performance, and there is evidence showing that Dunlap previously had rated Thomas' performance as "excellent."

In March 1999, Sales Manager Don Smith took over responsibility for Kentucky and became Thomas' supervisor. Although Defendant states that Dunlap discussed Thomas' inadequate performance with Smith, other evidence in the record shows that Dunlap praised Thomas' performance and that Dunlap never offered significant criticism of Thomas' work. Smith specifically describes Thomas' shortcomings, but Thomas rebuts Smith's testimony with his opinion that his performance was adequate and that Smith's criticisms were unfounded.

In March 1999, Lucent initiated a Talent Assessment process during which the sales managers were asked to evaluate the employees' skills and past performance. During this process, the sales managers identified the top ten percent and bottom ten percent of account executives. At the end of this process, the BSCT developed action plans for the top and bottom performers. Actions taken for the bottom performers included performance improvement, transfers to other

positions, or termination. Plaintiffs Pike and Thomas were ranked in the bottom ten percent during the Talent Assessment. The bottom ten percent list ultimately was reviewed and approved by Steven Russell and his supervisor, Carole Spurrier.

After the Talent Assessment, the action plan assigned to Plaintiff Pike was the "Resignation from Service" ("RFS") program. Plaintiff Pike did not accept the severence benefits offered under the RFS program. Instead, Pike joined the Sales Realization Organization, and Defendant states that Pike did not accomplish anything during his time in the Sales Realization Organization. According to Pike, Defendant assigned no duties to him after he joined the Sales Realization Organization. Plaintiff Pike was dissatisfied with his new assignment, and he requested and obtained a transfer back to field sales. Defendant subsequently decided to reduce its sales force and Plaintiff Pike was offered a severence package, which he declined. Plaintiff Pike's employment ended in March 2000, and he was not replaced.

In July 1999, after the Talent Assessment process, Plaintiff Thomas transferred to another department, and no one was hired to replace him. His account executive duties were assumed by Dixie Riddle and George Knieriem, who were both older than Thomas. Subsequently, Plaintiff Thomas resigned as part of an early retirement program.

DISCUSSION

Motions To Strike

The Court first considers the two pending motions to strike. First, Defendant moves to strike the supplemental report of Plaintiffs' expert John Miller. According to Defendant, the supplemental report is a completely new expert report, and it should be stricken because it was not disclosed during discovery. Defendant contends that the information forming the basis for Dr. Miller's revised report was disclosed to Plaintiffs in paper format as early as January 2001. Plaintiffs' expert did not analyze this data until after the Court ordered Defendant to produce the data in electronic format to allow Plaintiffs' expert to check the defense expert's work. Although Defendant had an opportunity to depose Dr. Miller, that deposition occurred before the disclosure of Dr. Miller's most recent report, which was filed as part of Plaintiffs' response to Defendant's motions for summary judgment. Now Defendant argues that Plaintiffs have appropriated the work product of the defense expert, Dr. White, and used Defendant's electronic database, not to check the expert's work, but to create an entirely new expert report at Defendant's expense. In addition, Defendant argues that Dr. Miller's analysis does more than check Dr. White's work because Dr. Miller used the electronic databases only to analyze select employment decisions and used age breaks not considered in Dr. White's report. For these reasons, Defendant asks the Court to strike the new report from the record because Plaintiffs have violated the rules requiring disclosure of expert reports during discovery.

Plaintiffs counter that they only received Dr. White's report a week before discovery closed; therefore, Plaintiffs could not produce a rebuttal report until after the close of discovery. Plaintiffs also accuse Defendant of concealing the identity of its expert until the discovery period was almost over. Furthermore, Plaintiffs argue that Dr. White's report was not a rebuttal report but an independent analysis and that the supplemental report of Dr. Miller was necessary to answer Dr. White's claim that the statistics showed no pattern of adverse treatment regardless of the age break used for the calculations.

The series of events described by the parties is simply the process inherent in any "battle of experts." Both parties have engaged experts, and both experts formulated their own opinions and questioned the conclusions reached by the other expert. Characterizing this give and take as "new" or "rebuttal" opinions accomplishes little. The Court will allow both parties to use the reports generated by their experts in an effort to prove their cases. Accordingly, Defendant's Motion To Strike Supplemental Report of Dr. John Miller [52-1] is hereby **DENIED**.

Second, Plaintiffs move to strike Defendant's reply to Plaintiffs' Joint Statement of Material Facts. Plaintiff argues that this reply allowed Defendants to submit fifty additional pages of argument. The Local Rules of this Court require the respondent to a motion for summary judgment: (1) to file a statement of material facts to which the respondent contends there remains a genuine issue of material fact to be tried and (2) to respond to the movant's statement of undisputed material facts. LR 56.1(B)(2), NDGa. The rules make no specific provision for the movant's obligations in the reply.

Replying to Plaintiff's enumerated disputed facts as Defendant chose to do is neither proscribed by the Local Rules nor unreasonable. While Defendant's reply is likely unnecessarily voluminous, the Court does not find it improper, and will not strike it. Accordingly, Plaintiffs' Motion To Strike Defendant's Reply to Plaintiffs' Joint Statement of Material Facts [62-1] is hereby **DENIED.**

Motion for Reimbursement of Costs for Expert Databases

When the Court ordered Defendant to produce the electronic databases created by its expert to Plaintiff, the Court indicated that the issue of reimbursement of some of Defendant's costs for creating those databases could be warranted. (Order, Jan. 11, 2002, at 2 [46-1].) Defendant now requests that the Court order Plaintiffs to share these expenses. Defendant has requested $5,950.00 as Plaintiffs' share of these costs. In calculating this figure, Defendant excludes the cost of creating any database not relied upon in Plaintiffs' expert's report, and Defendant seeks to recover only half of the cost of creating the databases upon which Plaintiffs' expert did rely. The Court finds that the fee for Defendant's expert was reasonable and that the defense expert's staff did not possess more expertise than necessary to create the database. Plaintiffs have requested an offset for the cost of creating the databases that Plaintiffs' expert produced. As explained above, Defendant asserts that, although all of the defense expert's electronic databases were made available to Plaintiffs' expert for examination, the amount requested excludes the cost of any database that Plaintiff did not rely upon expressly in producing his supplemental report. In light of this concession by Defendant; the Court finds that no

further offset is necessary. Defendant's Motion for Reimbursement of Costs for Expert Databases [57-1] is hereby **GRANTED**, and Plaintiffs are hereby **ORDERED** to remit $5,950.00 to Defendant to satisfy their share of the cost of creating the databases used by both parties. Defendant also requests attorney's fees on this motion, but the Court will not require Plaintiffs to pay attorney's fees.

Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that a district court shall grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is (1) no genuine issue as to any material fact and that (2) the moving party is entitled to judgment as a matter of law." The moving party bears the burden of showing the absence of a genuine issue as to any material fact. The applicable substantive law identifies which facts are material, and a fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 247, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. 477 U.S. at 249-50. The Court must view the materials submitted in favor of the motion in the light most favorable to the non-moving party. Adickes v. S.J. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 142 (1970).

When the nonmovant has the burden of proof at trial, the movant may carry its burden at summary judgment by demonstrating the absence of an essential element of the

nonmovant's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986), In determining whether the movant has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the nonmovant. Anderson, 477 U.S. at 255. If the movant meets this burden, the nonmovant then has the burden of showing that summary judgment is not appropriate by setting forth "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party cannot rely on the pleadings, but must file a response which includes other evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (stating that non-movant must come forward with "specific facts" showing genuine issue for trial); Combs v. Plantation Patterns, 106 F.3d 1519, 1526 (11th Cir. 1997). Mere conclusory allegations and assertions are insufficient to create a disputed issue of material fact. Earley v. Champion Int'l Corp., 907 F. 2d 1077, 1081 (11th Cir. 1990); Mack v. W.R. Grace Co., 578 F. Supp. 626, 630 (N.D. Ga. 1983).

In the present case, Plaintiffs have alleged age discrimination in employment. The ADEA provides, "It is unlawful for an employer... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Generally, plaintiffs alleging employment discrimination can seek to hold defendants liable under a disparate treatment or a disparate impact theory. Under the ADEA, the United States Court of Appeals for the Eleventh Circuit has held that the a disparate

impact claim under the ADEA is not a cognizable claim.[1] Adams v. Fla. Power Corp., 255 F.3d 1322, 1325-26 (11th Cir. 2001), cert. dismissed, - U.S.- , 122 S. Ct. 1290, 152 L. Ed. 2d 345 (2002). Therefore, Plaintiffs must proceed under a disparate treatment theory. A disparate impact claim is easier to prove since liability can be premised on a specific facialiy neutral employment practice which has had an adverse impact on members of the protected class. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994, 108 S. Ct. 2777, 2788, 101 L. Ed. 2d 827 (1988). Something more is required for a disparate treatment claim-the plaintiff must show discriminatory intent with direct or circumstantial evidence. See Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001) (noting that proof of discriminatory intent is required for claim of disparate treatment); Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1313 (11th Cir. 1994) (stating that plaintiff alleging disparate treatment claim must

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[1] Several circuits have held that no disparate impact claim exists pursuant to the ADEA. Miller v. City of Indianapolis, 281 F.3d 648, 651 (7th Cir. 2002); Mullin v. Raytheon Co., 164 F.3d 696, 704 (lst Cir. 1999); Furr v. Seagate Technology, Inc., 82 F.3d 980, 987 (10th Cir. 1996); see also DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 732 (3rd Cir. 1995) (doubting viability of disparate impact theory under the ADEA). For authority recognizing a disparate impact claim under ADEA, see Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 111 (2nd Cir. 2001), Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 953 (8th Cir. 2001); Smith v. Xerox Corp., 196 F.3d 358,365 (2nd Cir. 1999);. The Supreme Court declined to resolve the disagreement among the circuits when, after hearing oral arguments, the justices dismissed as improvidently granted the writ of certiorari in Adams. 122 S. Ct. 1290 (2002).

demonstrate that employer intended to discriminate against protected group).

I. Whether Plaintiffs Can Establish Their Claims Using Direct Evidence

In an employment discrimination action based on direct evidence, when a plaintiff produces direct evidence of discrimination, the employer must prove by a preponderance of the evidence that the same decision would have been made in the absence of the illegitimate criterion or protected characteristic. Evans v. McClain of Georgia, Inc., 131 F, 3d 957, 961 (11th Cir. 1997) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 109 S. Ct. 1775, 1795, 104 L. Ed. 2d 268 (1989). In other words, if direct evidence of discrimination is presented, the burden of persuasion shifts to the defendant.

Under Eleventh Circuit precedent, a statement by a decisionmaker reflecting a discriminatory attitude "ties the discriminatory attitude to the relevant employment decision;" therefore, such a statement is direct evidence of discrimination. Wright v. Southland Corp.,187 F. 3d 1287 (11th Cir. 1999). To qualify as direct evidence, the statement must be made by a decisionmaker, reflect a discriminatory attitude, and be related to an adverse action against an employee with a protected characteristic. See Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir.1998) ("remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination.") (citations omitted); Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d t354, 1359 (11th Cir.1999) (stating that evidence must indicate that the

employment decision was motivated by the decisionmaker's negative attitude about age); Carter v. Three Springs Residential Treatment, 132 F.3d 635, 642 (11th Cir. 1998) (opining that statement must relate directly to adverse action taken against employee possessing protected characteristic). Evidence that merely suggests a discriminatory motive is not direct evidence. Burrell v. Bd. of Trustees of Ga. Military College, 125 F.3d 1390, 1393-94 (11th Cir. 1997). Moreover, "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of age... constitute direct evidence of discrimination." Damon, 196 F.3d at 1359 (citations omitted); see also Carter, 132 F.3d at 642 (citing Harris v. Shelby County Bd. of Educ., 99 F.3d 1078, 1083 n. 2 (11th Cir. 1996) and noting that statements open to more than one interpretation do not constitute direct evidence of discrimination).

Plaintiffs contend that the following statements constitute direct evidence of discrimination. First, according to Mike Chancey, Craig Hixson told him that Lucent's motivation for Lucent's eliminations was "the fact that you guys are old bugs." (Chancey Dec. ¶ 16.) Second, Steven Russell reportedly stated that he needed "young, ex-military officers." (Knieriem Dec. ¶ 5; Chancey Dec. ¶ 5-8.) In addition, Mr. Russell stated in a memorandum, "I am looking to bring on a couple of young, hungry, and smart people leaving military service... to move them into AE vacancies as soon as possible... I would like to bring them on board to become the nucleus of a new AE breed." (Chance Dep. at 106-107; Ex. 36.) Allegedly, Clarence Harris told Plaintiff Pike that Pike's future with Defendant was in danger because the company was looking for younger people, indicating that Steven Russell wanted to surround himself with younger people. (Pike Interr.

Resp., Ex. K.) Finally, Plaintiffs assert that written comments about employees repeatedly listed youth as a positive characteristic. (See, e.g., Dunlap Dep., Ex, 36 (Talent Review Profiles of John P. Jones, Darren Durrett, and Brian Bouck).)

The Court initially determines who the decisionmakers were with regard to the alleged adverse employment actions against Plaintiffs. Allegedly, Plaintiff Pike suffered two adverse employment actions-a rank in the bottom ten percent of account executives and discharge. Likewise, Plaintiff Thomas reportedly was subjected to two adverse employment actions-a rank in the bottom ten percent of account executives and a transfer/demotion after the Talent Assessment. Plaintiffs point to statements by Craig Hixson, Steven Russell, and George Dunlap or other supervisors as direct evidence of discrimination. The Court must determine whether these individuals were involved in the decisions to rank Plaintiffs in the bottom ten percent and take the other alleged adverse employment actions against them. See Trotter v. Bd. of Trustees, 91 F.3d 1449-1453-54 (11th Cir. 1996) ("For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision.")

The alleged adverse employment actions resulted from the Talent Assessment process. After reviewing the evidence, the Court offers the following summary of the Talent Assessment process. Mr. Russell called a meeting of the sales managers, and they were instructed to rank the account executives under their supervision, compiling a list of the top ten percent and the bottom ten percent. (Dunlap Dep. at 95-99; Chance Dep. at 51, 53, 84.) The lists were created by a consensus of the

sales managers over the course of three meetings. (Dunlap Dep. at 104; Chance Dep. at 19.) Although he did not attend the meetings in their entirety, the process was overseen by Russell. (Smith Dep. at 111 .) Ostensibly, this process was initiated to come up with a plan to improve the employees' performance, but it later became clear that the rankings would be used to reduce the number of account executives at Lucent. (Dunlap Dep. at 114.) After the Talent Assessment meetings, those employees included in the bottom ten percent list were assigned action codes like transfer, place on performance improvement plan, or exit service, among others. Action codes first were assigned by the sales managers, but the choices were subject to review and approval by upper level management including Steven Russell and Carole Spurrier. (Dunlap Dep. at 115, 121; Chance Dep. at 19, 81, 147; Spurrier Dep. at 42, 45-46; May Dep. at 77.)

Craig Hixson was a member of Defendant's management, but he did not personally participate in the Talent Assessment process. He merely offered his opinion to Clarence Harris about his subordinates. (Hixson Dep. ¶ 5.) In light of the fact that Hixson did not participate in the Talent Assessment, the Court is hesitant to classify a rumor repeated by Hixson to Chancey about Lucent's motivation as direct evidence of discrimination. Moreover, the statement attributed to Hixson is not a statement of his view but rather a statement of his opinion of why Lucent was taking certain actions. Such a statement should not be considered. On the other hand, it is undisputed that Russell and Dunlap were involved in the Talent Assessment process that resulted in the low rankings and the changes in Plaintiffs employment status. Therefore, Russell's statements about the need for young people and the

allegations by a Talent Assessment participant (Harris) that Russell wanted to surround himself with young people can be considered if the other requirements for classifying statements as direct evidence can be met. Likewise, Dunlap's indications that youth was a virtue on employment evaluations can be considered.

Next, the Court must determine whether these remarks or statements reflect a discriminatory attitude so blatantly that the only intent could be to discriminate on the basis of age. The Eleventh Circuit has held that statements about a desire to attract younger employees are not direct evidence of discrimination. Beaver v. Rayonier, Inc., 200 F.3d 723,729.30 (11th Cir. 1999); see Damon, 196 F.3d at 1359 (decisionmaker's statement that the company needed to promote "aggressive young men" not direct evidence of age discrimination because it required inference that promoting young men required terminating older employees). Therefore, Russell's statements that the company needed to attract young salespeople or praising the young, without more, are not direct evidence of a discriminatory attitude. Simply praising youth does not invite the conclusion that age is a negative factor. However, statements praising the young, when coupled with derogatory comments about older workers, can be direct evidence. See Buckley v. Hosp. Corp. of Am., Inc., 758 F.2d 1525, 1530 (11th Cir.1985) (hospital administrators statement that the hospital needed "new blood" and that the plaintiffs advancing age impeded her constituted direct evidence in ADEA case). Negative statements about protected workers have been held direct evidence of a discriminatory motive. See Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999) (describing how decisionmaker told plaintiff that he might want to quit his job because he was getting too

old to learn new computer system); Haynes v. W.C. Cave & Co., Inc., 52 F.3d 928, 930 (11th Cir. 1995) (finding direct evidence of discrimination where decisionmaker stated that women were not tough enough to do certain job). Since the Court will not consider Craig Hixson's comment about the "old bugs," Plaintiffs have not pointed to the derogatory statements about older workers that would be necessary to support a finding that Plaintiffs have presented direct evidence of discrimination.

Because the Court concludes that Plaintiffs have not presented direct evidence of discrimination, there is no need to consider the final inquiry, whether the statements can be tied to the adverse employment actions Plaintiffs suffered. Nonetheless, Plaintiffs cannot satisfy this requirement either because the statements described by Plaintiffs do not show that Defendant was focusing on limiting older workers. See e.g., Maddow v. Procter & Gamble Co., Inc., 107 F.3d 846, 852 (11th Cir. 1997) (statement that company was only hiring sales reps under forty was direct evidence); Lindsey v. American Cast Iron Pipe Co., 772 F.2d 799, 802 (11th Cir.1985) (director's statement that he wanted a younger person to fill the position constituted direct evidence in ADEA case). In the present case, none of the statements referenced by Plaintiffs clearly show that Defendant intended to assess the older workers less favorably or to target them for termination, forced retirement, or demotion.

The Court finds that Plaintiffs have not presented direct evidence of age discrimination. Therefore, Plaintiffs must prove their case with circumstantial evidence. Still, the evidence categorized by Plaintiffs as direct evidence can be presented as part of the circumstantial case against Defendant.

See Burrell v. Bd. of Trustees of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997) (statements by a decision-maker that are not direct evidence of discrimination may still be used as circumstantial evidence of discriminatory motive).

II. Whether Plaintiffs Can Establish Their Claims Using Circumstantial Evidence

The United States Supreme Court outlined the requirements for proving employment discrimination using circumstantial evidence in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the McDonnell analysis, a plaintiff first must establish a *prima facie* case of discrimination. 411 U.S. at 802; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 67 L. Ed. 207 (1981) (stating that plaintiff bears initial burden of establishing *prima facie* case of discrimination); see Benson v. Tocco. Inc., 113 F.3d 1203, 1207 (11th Cir. 1997) (stating that plaintiff must produce sufficient evidence to support inference that employer based its decision on illegal criterion to establish *prima facie* case), Establishing a *prima facie* case has the same effect as a presumption of unlawful discrimination; the employer cannot be silent but must come forward with evidence of a legitimate nondiscriminatory reason for its decision. 411 U.S. at 802; Chapman v. A.I. Transp., 229 F.3d 1012, 1024 (11th Cir. 2000); Young v. Gen. Foods Corp., 840 F.2d.825, 828 (11th Cir. 1988). When a defendant expresses one or more legitimate reasons for the action, the presumption of discrimination evaporates, and a plaintiff must raise a genuine issue of material fact as to whether the reasons offered by the defendant are pretextual. McDonnell, 411 U.S. at 804; Chapman, 229 F.3d at 1024-25; Brown v. Amer. Honda

Motor Co., 939 F.2d 946, 946 (11th Cir. 1991) (requiring plaintiff to come forward with specific evidence demonstrating that defendant's reasons are pretext for discrimination after defendant offers sufficiently probative, credible, non-discriminatory reasons for its actions). If a plaintiff establishes a *prima facie* case and proffers sufficient evidence to allow a jury to disbelieve the employer's proffered reason for the action, that alone is enough to preclude summary judgment for the employer. Benson, 113 F. 3d at 1207 (citing Combs, 106 F.3d at 1532).

A. Whether Plaintiffs Have Established a *Prima Facie* Case

In an ADEA case, a plaintiff establishes a *prima facie* case by showing that he was (1) a member of the protected age group; (2) subject to adverse employment action; (3) replaced by a younger individual or treated less favorably than a younger individual; and (4) qualified to do the job. Verbraeken v. Westinghouse Elec. Corp., 881 F.2d 1041, 1045 (11th Cir. 1989), cert. dismissed, 493 U.S. 1064, 110 S. Ct. 884, 107 L. Ed. 2d 1012 (1990); see Holifield v. Reno, 155 F.3d 1555, 1556 (11th Cir. 1997) (characterizing third criterion in terms of being treated less favorably than person without protected characteristic).

In the present case, both Plaintiffs are more than forty years of age and, therefore, members of the protected age group. Both Plaintiffs allege that they were subject to adverse employment actions. For Pike, these adverse actions included being ranked in the bottom ten percent of performers during the Talent Assessment process, being designated for inclusion in the RFS program, being reassigned, and ultimately being

discharged in the Force Management Program. The adverse employment actions suffered by Plaintiff Thomas included a ranking in the bottom ten percent of performers during the Talent Assessment, a transfer/demotion, and a substantial reduction in pay.

First, Defendant argues the rankings do not qualify as adverse actions because performance evaluations and employment rankings standing alone do not constitute adverse employment actions for the purpose of establishing a discrimination claim. Davis v. Town of Lake Park, 245 F.3d 1232, 1241 (11th Cir. 2001). Although Defendant's statement of the law is correct, the Davis court noted that such a ranking could be an adverse employment action if the ranking resulted in a "tangible consequence" like the loss of pay or benefits or further discipline. Id. at 1240; see also Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001)(stating that negative evaluation is not adverse employment action without tangible negative effect). In the present case, the testimony submitted describes the Talent Assessment as a two-step process compiling a list of the bottom ten percent and assigning each person on that list an action code ranging from "coach and develop" to "exit service." (See, e.g., Dunlap Dep. at 114-15, 121 (explaining how action codes were assigned).) These action codes were used to determine Plaintiffs' future opportunities at the company, and both Plaintiffs can argue that their assigned action codes resulted in a tangible consequences including discharge, demotion, or loss of salary. A question of fact remains as to whether the bottom ten percent rankings of Pike and Thomas suffice as adverse employment actions.

Next, Pike's designation to exit service, the alleged reassignment to a job with no duties, and ultimate discharge necessarily qualify as adverse employment actions because each changed the terms and conditions of his employment. Defendant argues that Thomas' job transfer was voluntary but does not dispute the fact of his pay cut. Because there is evidence in the record to demonstrate that Thomas took a significant pay cut and suffered a severe economic loss when he took the reassignment, Plaintiff Thomas has at least raised a genuine issue of material fact as to whether he suffered adverse employment actions when he was transferred. The facts of Plaintiffs' cases demonstrate that each suffered adverse employment action.

In analyzing the third element of the *prima facie* case, the Court first considers whether there is evidence in the record to indicate that Plaintiffs were treated less favorably than younger employees during the Talent Assessment process. Plaintiffs submit evidence demonstrating that the bottom ten percent list consisted exclusively of older managers, specifically, managers over the age of forty-seven and that the top ten percent list included four employees in their thirties. The parties' experts disagree about the significance of these facts. The fact that Dunlap was older than both Plaintiffs calls the credibility of Plaintiffs' contentions into question, but it is not the province of the Court to find facts. Because of the purportedly negative treatment of older employees and the more favorable treatment of younger employees, there is a genuine issue of material fact as to whether Plaintiffs were treated less favorably in the talent review than their younger counterparts.

The Court next considers whether Plaintiffs were treated less favorably than younger employees when they were reassigned, discharged, or demoted. In addition, the Court must determine whether there is evidence in the record to show that Plaintiffs were replaced by younger individuals or that Defendant intended to discriminate on the basis of age in deciding who to reassign or terminate.[2] Significantly, Plaintiffs Pike and Thomas were not replaced. (Lucent's Resp. to Pl.'s First Interr., No. 3; Dunlap Dec. ¶ 45.) Moreover, Dixie Riddle and George Knieriem, employees who were older than Thomas, took over his responsibilities. (Smith Dep. at 126.) Because Plaintiffs were not replaced by younger employees, in order to establish a *prima facie* case they must show that Defendant intended to discriminate on the basis of age when deciding whose jobs would be affected after the Talent Assessment. See Earley, 907 F. 2d at 1082.

Plaintiffs offer circumstantial evidence that could support an inference of intentional discrimination in the Talent Assessment process and its aftermath. First, there is evidence in the record that top Lucent officials viewed the talent review process as an opportunity to "refresh" the sales force or "refresh the business." (Spurrier Dep. at 19, 32-37, 40, 50; May Dep. at 173-75; Chancey Dec. ¶ 9.) In addition, Plaintiffs offer more than one statement by Steven Russell indicating an age bias. These statements include: (1) a statement that he needed "young, ex-military officers;"

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[2] In a reduction-in-force case, instead of considering whether a younger person replaced the plaintiff, the final criterion becomes whether the employer intended to discriminate on the basis of age in deciding who to terminate. Earley v. Champion Int'l Corp., 907 F. 2d 1077, 1082 (11th Cir. 1990).

(Knieriem Dec. ¶ 5; Chancey Dec. ¶ 5-8); and (2) a statement in a memorandum that he was "looking to bring on a couple of young, hungry, and smart people leaving military service... to move them into AE vacancies as soon as possible" and make them "the nucleus of a new AE breed." (Chance Dep. at 106,107, Ex. 36): Next, some of Lucent's employees involved in the Talent Assessment indicated that Defendant was looking for younger people and that Steven Russell wanted to surround himself with younger people, Third, written comments about employees often listed youth as a positive characteristic. (Dunlap Dep., Ex. 36, Talent Review Profiles of John P. Jones, Darren Durrett, and Brian Bouck.) Plaintiffs also point out that the Talent Review Forms did not contain any objective measures of performance but called on the evaluators to rate the employees' "ability to develop and adapt." Lucent also encouraged the recruitment of recent college graduates because of their flexibility and skill. (Chancey Dec. ¶ 17, Ex. 1.) Finally, Plaintiffs offer statistical evidence that could indicate disparate treatment of employees more than forty-seven or fifty years of age.[3]

The Court notes that the evidence offered by Plaintiffs could support an inference of intentional discrimination. See

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[3] Defendant questions the probative value of this statistical data on the basis of the age breaks used and the expert's methodology. In addition, Defendant questions the relevance of Plaintiffs' statistical data since the defined protected category under the statute includes employees aged forty or older. The Court has considered these concerns but finds that the issues raised by Defendant go to the credibility of the statistical report and the weight that might be given to the expert's opinions. These issues are for jury determination.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153-54 (2000) (stating that age-biased comments by one person in a group can support inference of discrimination which combined with pretext evidence could allow jury to find intentional discrimination); Beaver v. Rayonier, Inc., 200 F.3d 723,729-30 (11th Cir. 1999) (noting that decisionmaker's desire to attract younger employees could support inference of discrimination when considered along with other evidence); Adams v. Ameritech Servs., Inc., 231 F.3d 414 (7th Cir. 2000) (finding that employer's layoff criterion including "potential to grow and change" invokes ageist stereotype that could support finding of intentional discrimination). Furthermore, while statistics alone cannot make a case of individual disparate treatment, statistics may support an inference of discrimination when used in conjunction with other circumstantial evidence of discrimination.

Defendant does not argue that Plaintiffs were not qualified to do their jobs at the time that these adverse employment actions occurred. In fact, Defendant's evidence shows that at least one decisionmaker did not believe that Plaintiffs' low rankings or eventual exits from service were based on poor performance. (See, e.g., Dunlap Dec. ¶ 31 .) Since Defendant Concedes the qualification element, Plaintiffs have presented enough evidence to raise a genuine issue of material fact as to each element of the *prima facie* case. Therefore, the burden shifts to Defendant to proffer legitimate nondiscriminatory reasons for Plaintiffs' bottom ten percent rankings, reassignments, and discharge or demotion.

2. Legitimate Nondiscriminatory Reason

Defendant offers several legitimate nondiscriminatory reasons for the alleged adverse actions taken against Plaintiffs. The Court will outline these reasons with regard to each Plaintiff and each adverse employment action.

Defendant gives a number of reasons for Plaintiff Pike's ranking in the bottom ten percent list. First, Dunlap states that Pike, while not necessarily a bad employee, was less valuable than other employees on the team. Dunlap gives several specific reasons for his assessment of Pike, including Pike's negative attitude, deficient skills when compared to others, and lagging product knowledge.

Next, Defendant submits that Pike's inclusion in the RFS program and later the FMP program was necessary as part of a reduction in force ("RIF") during which Plaintiff Pike's position was eliminated. A company's business decision to institute a reduction in force ("RIF") is a legitimate reason to discharge qualified employees. Furr v. Seagate Technology, Inc., 82 F. 3d 980, 986 (10th Cir. 1998) (stating that RIF is business decision and ADEA is not vehicle for reviewing RIF's propriety); see Faulkner v. Super Valu Stores, Inc., 3 F. 3d 1419, 1426-27 (10th Cir. 1993) (citing Lucas v. Dover Corp., Norris Div., 857 F. 2d 1397, 1404 (10th Cir. 1988) ("This court will not second guess business decisions made by employers, in absence of some evidence of impermissible motives."). Pike argues that the discharge was discriminatory because the account executive in the same territory that remained on staff was younger. Defendant offers several reasons for retaining Rick Gomez rather than Pike. Reportedly, Pike's attitude continued to worsen, and Gomez

was more valuable because of his superior ONG product knowledge.

During a RIF, a company is under no obligation to establish an internal transfer program or a right for senior employees to take the jobs of less senior employees. Jameson v. Arrow Corp., 75 F. 3d 1528, 1532-33 (11th Cir. 1996). If a particular job is eliminated for nondiscriminatory reasons, then plaintiff must show that he was qualified for another open job. Earley, 907 F. 2d at 1082-83. According to the Eleventh Circuit, the position must be open at the time of the discharge, and a showing that a position was open before plaintiff' s termination or several months after the termination is not enough. See Earley, 907 F. 2d at 1083 (noting that to survive summary judgment motion plaintiff must point to positions that were open at time of termination and for which he was qualified).

Defendant contends that there was no available job for Plaintiff Pike at the time of the RIF. In fact, it is undisputed that Plaintiff Pike applied for four open positions. Defendant asserts that Pike was not qualified to take any of these positions.

In addition, Defendant offers several legitimate nondiscriminatory reasons for Plaintiff Thomas' bottom ten percent ranking. Allegedly, in comparison with other members of the team, Plaintiff Thomas lacked ONG product knowledge, was reluctant to take on new responsibilities and learn new skills, and lacked presentation skills. Defendant argues that Thomas' job transfer was voluntary and not an adverse employment action. However, the Court considers the demotion an adverse employment action and assumes

Defendant would offer the same reasons for choosing to demote Plaintiff Thomas.

3. Pretext

To satisfy their burden, Plaintiffs must cast doubt on the proffered reasons, submitting evidence that would permit a reasonable fact finder to conclude that the employer's reasons did not in truth motivate his conduct. Tidwell v. Carter Prods., 135 F. 3d 1422, 1427 (11th Cir. 1998); Hairston v. Gainesville Sun Pub. Co., 9 F. 3d 913,921 (11th Cir. 1993). In other words, Plaintiffs must demonstrate that a factfinder could determine that the employer's reasons lack credibility. Combs v. Plantation Patterns, 106 F. 3d 1519, 1528 (11th Cir. 1997); See Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F. 3d 436, 444 (11th Cir. 1996) (stating that plaintiff should introduce evidence directed to veracity of employer's justification).

Generally, Plaintiffs argue that the talent review was a pretext for discrimination because the evaluators for the talent assessment were provided no objective criteria to guide deliberations and the profile forms were manipulated to match the rankings. In addition, Plaintiffs repeat the evidence used to establish their prima facie cases-allegedly ageist comments and statistical evidence-as evidence of pretext.

Even if the evaluators were given no standards for reviewing the employees, such a situation does not invite the inference that the reviewers would choose who would be placed on the bottom ten percent list by looking at employees' ages. In addition, the manipulation of the profile sheets to match the lists does not suggest that age was a motivating

factor in the process. Moreover, the ageist comments and statistical evidence in combination were enough to establish Plaintiffs' *prima facie* case, but, once Defendant has offered legitimate nondiscriminatory reasons for its actions, Plaintiffs must produce additional evidence to show that these reasons did not actually motivate the employer's conduct. The assertions that the Talent Assessment process were standardless, that the evaluations were manipulated to match the decisions that had been made, that ageist comments had been made, and that statistics could support a finding of discrimination against those employees over forty-seven[4] is not enough to satisfy Plaintiffs burden of showing pretext.

Specifically, to rebut Defendant's nondiscriminatory reasons for ranking him in the bottom ten percent, Plaintiff Pike offers his opinion that his attitude was not negative and his skills and knowledge were up to speed. Likewise, Plaintiff Thomas offers his opinion that his skills and product knowledge were adequate and that his performance was satisfactory. Both Plaintiffs offer good evaluations and accolades as evidence of pretext, asserting that Defendant cannot produce serious criticisms of plaintiffs that predate the Talent Review.

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[4] Defendant argues that the statistical evidence included in the report of Plaintiffs' expert is not relevant when considering the facts of Plaintiffs' cases. The Court has reviewed the report, but the databases examined are simply labeled with numbers. Therefore, without more information, the Court cannot determine how these statistics relate to the adverse employment actions allegedly suffered by Plaintiffs. Nonetheless, the statistics alone are not enough to raise a question of fact on the issue of pretext.

Courts routinely find that a plaintiff cannot rebut an employer's legitimate reasons for an action with his subjective beliefs or opinions. Lee v. GTE Fla., Inc., 226 F.3d 1249, 1254 (11th Cir. 2000) (explaining that plaintiff's own opinions about his qualifications do not give rise to material factual dispute); Ramsey v. Leath, 706 F.2d 1166, 1170 (11th Cir. 1983). Evidence of satisfactory performance also does not help Plaintiffs raise a genuine issue of material fact as to pretext. Defendant concedes that Plaintiffs had been good employees, but the nature of the Talent Assessment process and the subsequent reduction in force was that satisfactory employees could suffer negative consequences if they compared poorly to other employees.

In addition, Plaintiffs assert that the bottom ten percent list included mostly older workers and the top ten percent list included younger employees. Plaintiffs ignore the fact that the top ten percent list also included one of the oldest workers. Plaintiffs argument is further undermined by the fact that the main decisionmakers were older than Plaintiffs. When questioned about the rankings, Thomas offered several older employees that he believed should have been ranked lower than him.

In attempting to demonstrate pretext, Plaintiffs reiterate the alleged existence of a directive from Steven Russell to purge older workers. There is no evidence of such a plot beyond Plaintiffs' speculations. Moreover, courts look skeptically at elaborate plot theories when no evidence is presented to support the existence of a conspiracy. Konowitz v. Schnadig Corp., 965 F.2d 230, 234 (7th Cir. 1992); McCoy v. WGN Continental Broadcasting Co., 957 F.2d

368, 372 (7th Cir.1992); Gould v. Kemper Nat. Ins. Companies, 880 F.Supp. 527, (N.D.Ill. 1995).

Next, Pike fails to put forth evidence that Gomez was not a more valuable employee. Therefore, Pike cannot show that Defendant's decision to retain Gomez in the account executive position was a pretext for discrimination against Pike. Moreover, Pike did not present evidence to demonstrate that the persons who received the available jobs that he applied for during the RIF were less qualified for the positions than Pike. In fact, Pike has not even stated which employees were hired for those positions. Without such evidence, Pike cannot meet his burden to show that Defendant's nondiscriminatory reason for terminating him, a reduction in force and a lack of available jobs, was a pretext for discrimination.

Plaintiffs have failed to submit sufficient evidence to allow a jury to find that Defendant's proffered reasons for the actions taken against Plaintiffs were a pretext for discrimination.[5] Therefore, Plaintiffs have failed to carry their burden under McDonnell, and Defendant's Motions for Summary Judgment [41-1] and [42-1] are hereby **GRANTED**.

Conclusion

Defendant's Motion for Summary Judgment on Plaintiff Thomas' Claims [41-1] is hereby **GRANTED**; Defendant's Motion for Summary Judgment on Plaintiff Pike's Claims [42-1] is hereby **GRANTED**; Defendant's Motion To Strike Supplemental Report of Dr. John Miller [52-1] is hereby

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[5] Plaintiffs' state law claims would be analyzed under the same standards, and those claims are also subject to dismissal.

DENIED. Defendant's Motion for Reimbursement of Costs for Expert Databases [57-1] is hereby **GRANTED**, and Plaintiffs are hereby **ORDERED** to remit $5,950.00 to Defendant. Plaintiffs' Motion To Strike Defendant's Reply to Plaintiffs' Joint Statement of Material Facts [62-1] is hereby **DENIED**.

SO ORDERED, this day of August, 2002.

/s/ _____
RICHARD W. STORY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:00-CV-1406-RWS

[Filed November 6, 2001]

JERRY R. PIKE and PATRICK A. THOMAS, Individually and on behalf of others similarly situated,	)
Plaintiffs,	)
v.	)
LUCENT TECHNOLOGIES, INC.,	)
Defendant.	)

ORDER

Plaintiffs bring this action, on behalf of themselves and others similarly situated, alleging a pattern and practice of intentional age discrimination. Plaintiffs filed the Complaint on June 5, 2000, asserting collective action claims. Before filing the suit, Plaintiffs filed charges with the Equal Employment Opportunity Commission ("EEOC"), and they

were issued a "notice of right to sue" letter. Plaintiffs allege that the Complaint was filed within ninety (90) days of the receipt of this right to sue letter. Before the Court for consideration is Defendant's Motion To Dismiss Plaintiff's Collective Action Allegations [31-1]. After reviewing the record and considering the arguments of the parties, the Court enters the following Order.

Standard for Decision

Federal Rule of Civil Procedure 12(b)(6) empowers the Court to grant a defendant's motion to dismiss when a complaint fails to state a claim upon which relief can be granted. In considering whether to grant or deny such a motion, the Court may only look to the pleadings. Fed. R. Civ. P. 12(b). The pleadings are, in addition, construed broadly so that all facts pleaded therein are accepted as true and all inferences are viewed in a light most favorable to the nonmoving party. Cooper v. Pate, 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964). Thus, a motion to dismiss should be granted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Motions to dismiss are disfavored. Gasper v. Louisiana Stadium and Exposition Dist., 577 F. 2d 897, 900 (5th Cir. 1978);[1]

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[1] The United States Court of Appeals for the Eleventh Circuit adopted as binding precedent the decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981. Bonner v. City of Prichard, Ala., 661 F. 2d 1206, 1207 (11th Cir. 1981)

Woodham v. Fed. Transit Admin., 125 F. Supp. 2d 1106, 1108 (N.D. Ga. 2000).

Discussion

Defendant moves for dismissal of Plaintiffs' collective action allegations, arguing that Plaintiffs did not follow the proper procedure to commence a collective action. In determining whether this motion should be granted, the Court must focus on when an action is commenced under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

Generally, ADEA requires a plaintiff to commence an action within ninety (90) days of receiving a right to sue letter from the EEOC. 29 U.S.C. § 626(e). An individual action is commenced upon the filing of a complaint. Grayson v. Kmart Corp., 79 F.3d 1086, 1105 (11th Cir. 1996) (citing O'Connell v. Champion Int'l Corp., 812 F.2d 393, 394 (8th Cir. 1987)). In contrast, more than filing a complaint is necessary to commence a collective action. With regard to collective actions, the ADEA incorporates portions of the Fair Labor Standards Act ("FLSA"), including the provision that governs when an action is commenced. Grayson, 79 F.3d at 1106; See 29 U.S.C. § 256 (defining when action is commenced). Pursuant to FLSA's provision governing the commencement of actions, a collective action is commenced when a named plaintiff files both a complaint and a written consent to become a party plaintiff. 29 U.S.C. § 256(a).[2]

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[2] The code section reads, in pertinent, part:

In determining when an action is commenced for the

In this case, Plaintiffs assert that they seek relief for themselves and others similarly situated. Nonetheless, Plaintiffs simply filed the Complaint and did not file the written consents required by the statute. Therefore, no collective action was commenced, and Plaintiffs cannot represent other parties not named in this action.

Plaintiffs argue that 29 U.S.C. § 256 cannot be applied to ADEA claims because, by its terms, the statute only applies to statute of limitations calculations under 29 U.S.C. § 255. According to Plaintiffs, when Congress amended the ADEA in 1991, section 255 was deleted from the list of FLSA provisions applicable to the ADEA. The amendment replaced the two- or three-year statute of limitations provided by section 255 with a ninety (90) day limit. Plaintiffs assert that because section 255 no longer applies in ADEA cases, section

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> purposes of section 255 of this title, an action commenced on or after May 14, 1947...shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action...it shall be considered commenced in the case of any inficidual claimant -
>
> > (a) on the date when the complaint if filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
> >
> > (b) if such written consent was not so filed or if his name did not so appear - on the subsequent date on which such written consent is filed in the court in which the action was commenced.

256 also cannot be used to determine when an action is commenced under the ADEA. Plaintiffs' contention, though appealing, fails to convince the Court. Courts incorporate section 256 into the ADEA based on the collective action provisions of 29 U.S.C. § 216(b). Section 255 provides the statute of limitations for FLSA actions generally; hence, when Congress wanted to change the time limit for ADEA actions, the amendment expressly provided that section 255 would no longer be incorporated into the ADEA. The mere modification of the statute of limitations for ADEA claims did not affect the procedure, provided in 29 U.S.C. § 256, for commencing a collective action. FLSA's collective action procedures were applied to ADEA collective actions prior to the 1991 amendments; therefore, if Congress wanted to provide a different rule for commencing an ADEA collective action, they could have done so. Nothing in the current statute prevents courts from applying section 256 to ADEA actions. Since Plaintiffs failed to satisfy the requirements for commencing a collective action, the claims for collective relief must be dismissed.

Defendant also urges the court to dismiss Plaintiffs' individual claims, contending that the failure to file the consents is also fatal to the individual claims. There is legal precedent supporting Defendant's argument. Some courts have held that named plaintiffs purporting to bring a collective action cannot pursue their individual claims if they do not file written consents within the limitations period. Bonilla v. Las Vegas Cigar Co., 61 F. Supp. 2d 1129, 1132-33 (D. Nev. 1999); see Lee v. Advance Executive Prot., Inc., 2001 WL 108760, at *5-6 (4th Cir. 2001) (calculating statute of limitations from filing of consents even for named plaintiffs in collective action); In re Food Lion, Inc., 1998 WL 322682,

at * 12-13 (4th Cir. 1998) (stating that consents were required for named plaintiffs to join collective action even though they would not have been necessary for action pursued individually); Archer v. Sullivan County, 1997 WL 720406, at *2 (6th Cir. 1997) (declaring that collective action commenced when named plaintiffs filed consents); Salazar v. Brown, 1996 WL 302673, at *9 (W.D. Mich. 1996) (distinguishing individual and collective actions under FLSA and deciding that named plaintiffs were required to file consents to commence action when they intended to bring collective action); Wertheim v. Arizona, 1993 WL 603552, at *7 (D. Ariz. 1993) (finding that statute of limitations continues to run as to named plaintiff of putative collective action until he files written consent).

On the other hand, some courts have adopted a different view, dismissing claims for collective relief when the named plaintiffs failed to file consents but allowing the claims of the individual plaintiffs to go forward. See Songu Mbwira v. Davis Memorial Goodwill Indus., 144 F.R.D. 1, 2 (D.D.C. 1992) (striking class action allegations when consent was not filed timely but allowing plaintiff to proceed on individual claim); Perella v. Colonial Transit, Inc., 148 F.R.D. 147, 150 (W.D. Pa. 1991) (finding that consent requirement only applied to collective actions and timely filed complaint commenced purported class representative's individual claims).

As pointed out by Defendant, several Courts have adopted the view that individual plaintiffs intending to pursue a collective action must file the required consents or risk losing their individual claims; however, no case cited by Defendants constitutes binding precedent for this Court. Significantly,

only one case espousing this view is published, and the text of the others can be found only on Westlaw. This Court is hesitant to follow the courts who would deny individual plaintiffs a right to relief simply because they intended to represent others and failed to abide by the procedure for representative action. If Plaintiffs simply wished to pursue their own claims, their action would have commenced simply by filing the Complaint. A more logical conclusion is the one adopted by the Songu and Perella courts. This Court finds that Plaintiffs commenced their individual actions by filing the Complaint. Had Plaintiffs filed written consents within the ninety (90) day limitation period, Plaintiffs also could have represented other employees; however, because they failed to file the consents, the collective action never commenced. Penalizing Plaintiffs for seeking to include others could result in an "every employee for himself" attitude and could lead to a proliferation of individual lawsuits. Moreover, discouraging collective actions takes away an important tool that groups of employees traditionally use to remedy systemic discrimination. Thus, Plaintiffs' individual ADEA claims are not subject to dismissal because the Complaint was filed before the ninety (90) days expired.

Even though Plaintiffs' individual actions appear to be timely filed, Defendant asserts that Plaintiffs averred only a collective ADEA claim. This contention is unsupportable. The style of the Complaint states that the action is asserted, "Individually and on behalf of others similar situated." That phrase alone should have alerted Defendant that Plaintiffs are pursuing individual claims. Even so, the remaining allegations of the Complaint also show that Plaintiffs seek individual as well as collective relief. Plaintiffs include general allegations about Defendant's alleged scheme to purge older workers, and

these general allegations are followed by accounts of Plaintiffs' personal experiences. See Compl. ¶¶ 14-21 (alleging discriminatory practices); Compl ¶¶ 22-29 (recounting Plaintiff Pike's experience); Compl. ¶¶ 30-36 (describing Plaintiff Thomas's situation). These specific individual accounts were not necessary if Plaintiffs only sought relief for generalized discrimination within the company. Plaintiffs claim entitlement to relief under the ADEA, stating, *inter alia,* "Each of the plaintiffs was discriminated against on account of his age, in violation of Sections 4(a)(1) and (2) of the ADEA. 29 U.S.C. § 623 (a)(1) and (2)." (Compl. ¶ 38.) Since there are two named plaintiffs, the allegation of discrimination against "[e]ach of the plaintiffs" could refer to discrimination against both named Plaintiffs or discrimination against the named Plaintiffs and others not named. Therefore, the claim for relief under the ADEA is sufficient to allege individual ADEA claims as well as collective claims.

Conclusion

Accordingly, Defendant's Motion to Dismiss [31-1] is **GRANTED in part and DENIED in part**. For the foregoing reasons, the collective action allegations in the Complaint are hereby **DISMISSED**. Plaintiffs may proceed with their individual claims under the ADEA and state law.

On July 23, 2001, the Court Stayed discovery to allow the parties to pursue mediation. Counsel have advised the Court that they have been unable to resolve the case through, mediation. Therefore; it is appropriate to lift the stay on discovery. It is therefore **ORDERED** that the stay on discovery be lifted, and that discovery be commenced upon

entry of this Order and expire thirty-six (36) days thereafter, unless otherwise ordered by the Court.

SO ORDERED, this 31st day of October, 2001.

/s/ _____
Richard W. Story
United States District Judge

(2)

Supreme Court, U.S.
FILED
OCT 7 - 2003
OFFICE OF THE CLERK

No. 03-199

IN THE

Supreme Court of the United States

JERRY R. PIKE and PATRICK A. THOMAS,

Petitioners,

v.

LUCENT TECHNOLOGIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners Jerry R. Pike and Patrick A. Thomas were Plaintiffs and Appellants in the proceedings below.

Respondent Lucent Technologies, Inc. was Defendant and Appellee in the proceedings below.

Lucent Technologies, Inc. has no parent company and no publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

Petitioners Jerry R. Pike (age 52) and Patrick A. Thomas (age 48) worked for Lucent Technologies, Inc. as Account Executives on its BellSouth Customer Team ("BSCT"). Petitioners filed their complaint under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") and state discrimination laws.

Petitioners allege that the highest levels of Lucent management developed a scheme to "purge" older workers from the company. Petitioners allege that, as part of this scheme, Lucent developed the Talent Assessment Process to systematically select older workers for discharge. The Talent Assessment Process involved ranking all employees in the Top 10% and Bottom 10% of their operational unit. Petitioners allege that Lucent ranked both of them in the Bottom 10% of the BSCT during this process because of their age. Neither Petitioner, however, was discharged based on this ranking. Thomas voluntarily transferred to a different Lucent department and he remained employed until he voluntarily resigned in 2001. Pike was discharged approximately eight months after the Talent Assessment Process was completed as part of an unrelated reduction-in-force.

In the litigation, Petitioners did not uncover any evidence to support their theory that Lucent sought to "purge" older workers or that they were selected for the Bottom 10% based on their age. To the contrary, the evidence shows that Lucent's BSCT actively recruited and retained older workers during the time that the alleged purge was occurring. As a result of Lucent's efforts, after the Talent Assessment Process was completed, the percentage of workers over age 40 on the BSCT had increased. In addition, Petitioners could not rebut the reasons for their ranking in the Bottom 10% of the BSCT or for Pike's discharge under the reduction in force — their relative lack of skills and their focus on selling products which were becoming obsolete and being de-emphasized by Lucent.

Importantly, there also was no evidence that Petitioners' age factored into any part of the decision-making processes. The relevant decision-makers were each older than Petitioners and were also evaluated under the same Talent Assessment process. Given their age, these decision-makers plainly would not have cooperated in a scheme to purge older workers. Under these facts, the District Court properly dismissed Petitioners' claims and this dismissal was affirmed by the Eleventh Circuit.

Petitioners argue that the Eleventh Circuit erred because it did not follow this Court's decisions establishing the applicable summary judgment standards. The Eleventh Circuit, however, followed all of this Court's precedent regarding the applicable summary judgment standard. Nonetheless, Petitioners argue that the Eleventh Circuit should have analyzed their claims using the mixed motive analysis announced by this Court in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). *Costa*, however, is not applicable in this case. In *Costa*, this Court found that Congress changed the mixed motive analysis for claims arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, through the Civil Rights Act of 1991 ("1991 CRA"). The 1991 CRA's mixed-motive amendments, however, do not apply to ADEA claims.

Moreover, even if *Costa* did apply, it would not have saved Petitioners' claims because they did not present evidence that their age was a motivating factor in the challenged decisions. At best, Petitioners raised a *prima facie* inference of discrimination, but their evidence was insufficient to trigger a mixed motive analysis. For this additional reason, Petitioners arguments lack merit and the Court should refuse to review the lower courts' rulings.

Given the lack of merit in Petitioner's claims, the Eleventh Circuit's ruling on their collective action allegations is moot. Nevertheless, the evidence demonstrates that

Petitioners never requested to proceed as a collective action and they failed to file consents mandated by the applicable statute. The Eleventh Circuit, therefore, properly applied 29 U.S.C. § 626 to find that they could not pursue a collective action. For these reasons, the Court should deny Petitioners request for review of the collective action decision in this case.

COUNTERSTATEMENT OF THE CASE[1]

Lucent is a corporation that manufactures and sells equipment and provides related services to companies in the telecommunications industry. (Dunlap Dec. ¶ 2). Pike and Thomas both worked as Sales Account Executives on Lucent's BSCT. The BSCT was responsible for selling Lucent equipment to BellSouth Corporation ("BellSouth") throughout the Southeast. (Dunlap Dec. ¶ 3; Pike Dep. p. 26).

A. Lucent's Products

The BSCT Account Executives were categorized into groups such as the Network Products Group ("NPG") and the Optical Networks Group ("ONG") according to the type of products that they sold. (Dunlap Dec. ¶ 8; Pike Dep. pp. 34, 48). NPG products include those which are based on mature technology, and they are often referred to as "copper" products. (Dunlap Dec. ¶ 8; Pike Dep. pp. 34-35). The NPG products were considered "commodity" products, which mean almost any company could manufacture these products. (Dunlap Dec. ¶ 8). Due to the competition in this market, the NPG products were generally lower revenue products. (Dunlap Dec. ¶ 8).

The ONG products are based on optical transmission technology, and they are often referred to as "optical

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1. The Statement of Facts set forth in the Petition does not contain any of the relevant facts considered by the lower courts and, accordingly, Lucent provides this summary.

products". (Dunlap Dec. ¶ 9; Pike Dep. p. 36). These products first began to be developed in the late 1980s and, in comparison to NPG products, they are more technically sophisticated, and they can carry a significantly greater amount of information at a much greater speed. (Dunlap Dec. ¶ 9).

In the 1990s, BellSouth began to shift its focus toward ONG products because of their relative advantages over NPG products. (Dunlap Dec. ¶ 10). At the same time, Lucent began to aggressively market and develop ONG products, and it viewed these products as the future for Lucent. (Dunlap Dec. ¶ 10).

B. Pike Was Responsible For NPG Sales In South Florida and His Supervisors Viewed Him As One of the Lowest Performers.

When he became a BCST Account Executive, Pike was primarily responsible for selling NPG products in South Florida. (Pike Dep. p. 27). At that time, Sales Manager Dave Collins supervised Pike. (Collins Dec. ¶ 3). Collins supervised Pike for more than two years, and he believed that Pike was one of the lowest performing Account Executives that he supervised. (Collins Dec. ¶ ¶ 3, 6). Collins noted that Pike had developed a perception that certain customers were not receptive to him and that they viewed him, the Company and its products in a negative light. (Collins Dec. ¶ 4; Pike Dep. p. 65, 71, Exh. 6 to Pike Dep.). Pike also demonstrated difficulty in establishing relationships with some of his customers at BellSouth. (Collins Dec. ¶ 5). On at least one occasion, Pike avoided a key customer because he believed that the customer was not receptive to him. (Collins Dec. ¶ 5; Pike Dep. pp. 65, 71, Exh. 6 to Pike Dep.). Collins believed that Pike did not aggressively pursue, or endeavor to inform himself of, new contacts at the customer, or all new avenues of business with the customer. (Collins Dec. ¶ 5).

In November 1998, Sales Manager George Dunlap replaced Collins and assumed responsibility for Florida. (Dunlap Dep. pp. 9-10; Dunlap Dec. ¶ 22). When he transitioned his employees to Dunlap, Collins told Dunlap that Pike was one of the lowest performing Account Executives. (Dunlap Dep. p. 38). Collins told Dunlap that Pike had a "dark cloud over his head," and he had a negative attitude about the Company. (Dunlap Dep. p. 38). Based on his experiences with Pike, Dunlap formed the same opinion of Pike's relative skills and performance.

C. Thomas Was Responsible For Sales In Kentucky and Three Supervisors Viewed Him As A Poor Performer.

Like Pike, Thomas was a BSCT Account Executive who was primarily responsible for selling NPG products, and his sales territory was Kentucky. (Thomas Dep. pp. 17-18, 31-33; Dunlap Dec. ¶ 14). In 1996, Lucent laid off an Account Executive located in Kentucky and, as a result, Thomas also assumed responsibility for ONG sales in Kentucky. (Thomas Dep. pp. 11-12, 36-37). At that time, Sales Manager Dennis Beck supervised Thomas. (Thomas Dep. pp. 45, 109-10).

Lucent gave Thomas sufficient training to become familiar with ONG products. (Thomas Dep. pp. 37-38). Nevertheless, Thomas never became sufficiently familiar with these products to sell them effectively. (Dunlap Dec. ¶ 16; Thomas Dep. pp. 39-40). Thomas frequently had to call either his supervisors or other headquarters sales and technical personnel to make sales presentations or product demonstrations for him to BellSouth's network planners. (Dunlap Dec. ¶ 16). In fact, each of the three Sales Managers who supervised Thomas after he received responsibility for ONG sales discussed with him the fact that he needed to increase his knowledge of ONG products. (Thomas Dep. pp. 45-48; Dunlap Dec. ¶¶ 15-16; Dunlap Dep. pp. 132-36).

In 1997, Sales Manager George Dunlap replaced Beck and became Thomas' supervisor. (Dunlap Dep. pp. 9-10). At that time, Dunlap met with Beck and told him that Thomas was "not one of the best Account Executives" under his supervision. (Dunlap Dep. pp. 131-33). In particular, Beck told Dunlap that Thomas did not learn the ONG product line as quickly as he should have. (Dunlap Dep. pp. 133-136). Beck also told Dunlap that he had considered terminating Thomas in 1996 when he laid off the other Kentucky Account Executive, but that he did not do so because he did not want to be left without an Account Executive in Kentucky. (Dunlap Dep. pp. 133-34).

After supervising Thomas, Dunlap had many of the same concerns regarding Thomas' performance that Beck had identified to him. (Dunlap Dec. ¶ 15). In particular, Dunlap believed that Thomas did not have sufficient ONG product knowledge to make presentations, answer technical questions, and develop solutions to customer problems. (Dunlap Dec. ¶ 16; Dunlap Dep. pp. 109-10). In addition, Dunlap noted that Thomas did not have sufficient contact with his BellSouth customers to understand BellSouth's needs and plans for its network in Kentucky. (Dunlap Dec. ¶ 18).

In March 1999, Lucent again shifted sales territories, and Sales Manager Don Smith assumed responsibility for Kentucky from Dunlap. (Smith Dep. p. 20). As part of this transition, Smith discussed Thomas' performance with Dunlap. (Smith Dep. pp. 53-57, 73-76). Dunlap told Smith that Thomas was one of his weakest Account Executives, and that he was not current on the ONG technology. (Smith Dep. pp. 73-76). Dunlap also noted that Thomas was not effective at sales presentations, and that he required assistance from other employees to handle his presentations. (Smith Dep. pp. 73-75).

After this meeting, Smith attended a client meeting with Thomas in Louisville, Kentucky. (Smith Dep. pp. 52, 58-64). Based on this meeting, Smith determined that Thomas did not have a good relationship with the client. (Smith Dep. pp. 52, 58-64). Smith also noted that the client directed most of the technical questions to him, rather than to Thomas, which suggested that the client did not have confidence in Thomas' ability to handle these questions. (Smith Dep. pp. 52, 58-64). Smith determined that Thomas was not suited for a job that involved direct aggressive sales with front line customers in a technical optical networking environment. (Smith Dep. p. 71).

D. Sales Executive Steven Russell Assumed Responsibility for the BSCT And Lucent Established the Talent Assessment Process.

On or about March 4, 1999, Lucent initiated a Talent Assessment process designed to evaluate the skills possessed by its employees, and to determine the proper role for them in the company based on the changing market and Lucent's future needs. (May Dep. pp. 33-34, 69; Spurrier Dep. pp. 19-20, 32-33, 37-38). This process was designed to "raise the bar" and improve Lucent's talent level by identifying those employees with high and low relative skills, performance and/or behaviors. (Dunlap Dec. ¶ 26).

In late April, 1999, the Sales Vice President for the BSCT (Steven Russell) held a meeting to explain this process. (Dunlap Dep. pp. 84-85, 91-92). Russell explained that each level of management was expected to begin meeting to identify the Top 10%, Middle 80% and Bottom 10% performers among their subordinates. (Dunlap Dec. ¶ 27; Dunlap Dep. pp. 89-90). For example, the Sales Managers evaluated the Account Executives and lower level employees under their supervision and, in turn, the Sales Directors would perform the same evaluation of the Sales Managers under their supervision. (Dunlap Dec. ¶ 27; Dunlap Dep. pp. 89-

90). At the end of this process, the BSCT was required to create action plans for the Top 10% performers, which could involve increased job responsibility, training, and other actions designed to prepare them for advancement in the business. (Dunlap Dec. ¶ 28; Dunlap Dep. pp. 86-87). At the same time, the BSCT was required to develop action plans for the Bottom 10% performers, which could involve an attempt to improve their performance, a transfer to a position more suited to their skills, or an exit from the business. (Dunlap Dec. ¶ 28).

Because the Sales Managers were comparing the Account Executives to one another, it is possible that an Account Executive who had received good performance reviews and had overall satisfactory performance would be ranked in the Bottom 10% based on his performance relative to the other BSCT Account Executives. (Dunlap Dec. ¶ 30). In addition, rather than merely evaluating the Sales Account Executives' prior performance, as had been done in the performance evaluations, the Sales Managers were also asked to examine their skills, Lucent's future needs, and the Account Executive's ability to adapt and succeed in the future. (Dunlap Dec. ¶ 30; May Dep. pp. 146-47).

1. Dunlap and Smith Selected Petitioners for the Bottom 10%.

At that time, most of the Account Executives were located at BellSouth's headquarters. Dunlap and Smith were the only Sales Managers who supervised Account Executives who handled sales in the field, rather than at headquarters. Therefore, prior to the first meeting among the Sales Managers to evaluate all BSCT Account Executives, Smith and Dunlap met to discuss the field sales Account Executives to ensure that their rankings at the subsequent Sales Manager meetings would be consistent. (Smith Dep. pp. 113-14).

Dunlap determined that Pike was one of the Bottom 10% performers based on his prior experience with him. (Dunlap Dec. ¶ 32). Dunlap noted that Pike was pessimistic, had a "gloom and doom" approach to sales and acted as if "everything that can go wrong, will go wrong." (Dunlap Dep. p. 107; Dunlap Dec. ¶ 33). Dunlap also noted that Pike had been working with NPG products for more than twelve years, and that he had never expanded his areas of expertise. (Dunlap Dep. p. 108). Dunlap based his opinion on his personal experiences with Pike, including his telephone conversations and personal visits with Pike, and the input he had received from Pike's former supervisor, Dave Collins. (Dunlap Dep. pp. 60-64, 66-69, 108).

Dunlap also believed that Pike's attitude adversely affected his sales presentation skills. (Dunlap Dep. pp. 61-64). At one presentation in particular, Pike told the decision-makers that the product he was trying to sell them had not been approved for purchase by BellSouth, and that he did not know if it could be approved. (Dunlap Dep. pp. 62-63). Dunlap was seriously concerned about Pike's comment because, as a salesman, he believed that you should present your best case to the customer. (Dunlap Dep. pp. 62-63). Dunlap was stunned that Pike had volunteered reasons that BellSouth could not use his product in his sales pitch. (Dunlap Dep. pp. 62-63; Dunlap Dec. ¶ 23). At the time that Dunlap (age 52) made this determination, he was older than Pike. (Dunlap Dep. p. 194; Pike Dep. p. 12).

Smith and Dunlap also discussed Thomas and both agreed that he was one of the Bottom 10% performers based on their prior experience with him, including his demonstrated resistance to learning new products, his relative lack of creativity and aggressiveness as compared to other Account Executives, and his lack of contact with key customers. (Dunlap Dec. ¶ 32). Although Smith had only supervised Thomas for a short time, he had knowledge of Thomas through past experience on the BSCT, including his

involvement at sales meetings and other team functions, and based on his knowledge of the BSCT's performance over time. (Smith Dep. pp. 51-64, 107-08). In addition, Smith was aware of the performance of other Account Executives whom he had supervised, and Thomas did not compare favorably to these other Account Executives. (Smith Dep. pp. 123-26). At the time that Smith (age 48) and Dunlap (age 52) conducted these evaluations, they were both older than Thomas. (Smith Dep. p. 28; Dunlap Dep. p. 194; Pike Dep. p. 12; Exh. I).

At the time that he ranked Thomas in the Bottom 10%, Smith supervised a total of nine Account Executives. (Dunlap Dec. ¶ 32). Of these nine, Thomas was the third youngest at age 47. (Dunlap Dec. ¶ 32). At the same time, Smith placed Tommy Walker (age 50) in the Top 10%. (Dunlap Dec. ¶ 32; Exh. I).

2. The Sales Managers Conducted Three Meetings to Identify the Top and Bottom 10% Among BSCT Account Executives.

Beginning on April 21, 1999, the Sales Managers held three meetings at which they discussed the Top 10% and Bottom 10% ranking decisions for all BSCT Account Executives. (Chance Dep. pp. 85, 115). Fifteen of the sixteen Sales Managers at these meetings were over age forty, and twelve of them were older than Thomas. (Dunlap Dec. ¶ 37; Exh. I). In addition, all of the Sales Managers were going to be ranked by their superiors (the Sales Directors) using the same criteria they had used to evaluate the BSCT Account Executives.

At these meetings each Sales Manager identified the Top and Bottom 10% Account Executives from his Team, and the other Sales Managers discussed whether they agreed with the assessment. (Dunlap Dep. pp. 98-99). Dunlap placed Pike among the Bottom 10% performers and Smith placed Thomas among the Bottom 10% based on their relative performance

as compared to the other BSCT Account Executives. (Dunlap Dec. ¶¶ 33-34). No one at the Sales Manager meetings suggested that either Pike or Thomas did not belong in the Bottom 10%. (Dunlap Dec. ¶ 34; Chance Dep. p. 78).

3. After the Talent Assessment Process, the Percentage of Older Workers on the BSCT Increased.

In the one year following the completion of the Talent Assessment process, the percentage of employees over age 40 on the BSCT increased from 67% to 70%. (White Expert Report, pp. 4-5). During that time frame, the BSCT hired seven managers, five of whom were over age forty and three of whom were over age fifty. (May Dec. ¶ 7). In addition, the BSCT offered stock options to at least forty-eight managers over age 40 as an incentive to remain on the BSCT. (May Dec. ¶ 4; Exh. 2 to May Dec.; White Expert Report p. 5; Table 6 to White Expert Report).

E. Before the Talent Assessment Process was Completed, Thomas Voluntarily Sought a Different Position with Lucent.

Although Thomas was selected for the Bottom 10%, Lucent never assigned an action code to him and in turn never determined whether it would train, transfer or discharge him. Before management informed him of his ranking, Thomas had heard a rumor from Pike that he might be included in the Bottom 10% and he chose to find another job within Lucent before any decision was made. (Thomas Dep. pp. 50, 116, 120-21). On or about July 1, 1999, Thomas transferred to an Operations Supervisor position in the Installation Department. (Thomas Dep. pp. 120-21). After his transfer to Installation, no one was hired to replace Thomas. (Dunlap Dec. ¶ 45). Thomas' former duties were assumed by Dixie Riddle (age 56) and George Knieriem (age 55). (Smith Dep. p. 126; Exh. I). To date, Lucent has not hired a BSCT Account Executive in Kentucky. (Dunlap Dec. ¶ 45).

Thomas remained in the Installation Department until July, 2001. At that time, Lucent created a program that offered enhanced retirement benefits to employees who resigned their employment, which was called the "5 and 5" program. (Dunlap Dec. ¶ 2; Smith Dep. p. 30). On or about July 15, 2001, Plaintiff voluntarily resigned his employment under the "5 and 5" program. (Dunlap Dec. ¶ 21). Thomas admits he did not experience any age discrimination during the remainder of his tenure with the Installation Department. (Thomas Dep. p. 124).

F. After The Talent Assessment Process Was Completed, Pike Was Transferred to the Sales Realization Organization ("SRO") and Later Was Discharged as Part of a Reduction in Force.

Unlike Thomas, Pike remained with the BSCT for approximately eight months until he was downsized as part of a reduction in force. After his selection to the Bottom 10%, Lucent initially assigned Pike to a newly-created organization, the Sales Realization Organization ("SRO"), which was responsible for handling contract or technical issues that arise after a sale is completed. (Thrift Dec. ¶ 3; Spurrier Dep. pp. 56-57).

Although he was officially assigned to SRO, Pike continued to function as an Account Executive. (Pike Dep. p. 176). Pike admits he did not accomplish anything while assigned to the SRO. (Pike Dep. p. 187). Instead, Pike repeatedly expressed dissatisfaction with his assignment to SRO and requested that he be moved back into his field sales position. (Thrift Dec. ¶ 3; Pike Dep. pp. 176, 185). Based on his request, Pike was ultimately transferred back to field sales and began to sell NPG Products in South Florida. (Thrift Dec. ¶ 3; Pike Dep. pp. 177-78). After his transfer, Pike reported to Sales Manager Don Smith. (Thrift Dec. ¶ 3).

Pike remained in field sales until he was discharged as part of a reduction in force. In November, 1999, Lucent determined that it would need to reduce expenses drastically and, as part of that effort, the BSCT had to reduce headcount. (Chance Dep. pp. 21-22; Thrift Dec. ¶ 6). At that time, Sales Director Vicky Thrift supervised Smith's team. (Thrift Dec. ¶ 6). In deciding which positions to eliminate, the primary factors Thrift considered were the BSCT's new emphasis on centralizing sales and de-emphasis of field sales; the simultaneous increase in focus on ONG products and decreasing importance of NPG; and the ability of a location to function effectively after a headcount reduction. (Thrift Dec. ¶ 9; Smith Dep. p. 147; Spurrier Dep. p. 55; Dunlap Dep. p. 92; Thomas Dep. pp. 75, 81). Thrift decided to select Pike for the reduction in force, rather than Account Executive Rick Gomez based on Smith's input about Pike and Gomez, as well as her own observations and experiences as a Manager on the BSCT (including her conversations with other Managers and meetings where Account Executives were discussed). (Thrift Dec. ¶ 7; Smith Dep. pp. 43-45, 48-49, 146, 150).

Thrift determined that Gomez had expertise in ONG products, whereas Pike's primary experience was in NPG Products, which were being de-emphasized by the customer. (Thrift Dec. ¶ 8; Smith Dep. p. 39) Although Pike was encouraged to expand his knowledge of ONG products through training and by attending presentations with Gomez, he did not develop or retain this important knowledge. (Thrift Dec. ¶ 8; Gomez Dec. ¶ 7). Given BellSouth's emphasis on ONG products, and the de-emphasis of NPG products, Gomez's expertise was more important to the BSCT than Pike's. (Thrift Dec. ¶ 8).

In addition, before coming to Lucent, Gomez had worked for BellSouth for approximately thirteen years. (Thrift Dec. ¶ 9). During that time, Gomez established relationships with important decision makers at all levels of the BellSouth

hierarchy, and he effectively translated these relationships into business for Lucent. (Thrift Dec. ¶ 9). In contrast, Mr. Pike had difficulty establishing relationships with some of his BellSouth contacts and even avoided at least one key customer with whom he was not comfortable. (Thrift Dec. ¶ 9).

Pike's employment with Lucent ended on March 14, 2000. (Thrift Dec. ¶ 11). Mr. Pike was not replaced. Instead his duties were absorbed by Rick Gomez (age 34), Calvin Beck (age 51), Paul Reis (age 41) and Tommy Walker (age 50). (Thrift Dec. ¶ 12).

REASONS FOR DENYING THE PETITION

This Court's own rules mandate that a "petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The Court's rules provide specific examples of the cases it considers for review and further points out that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Despite the clarity of this Rule, Petitioners seek this Court's review of a case that represents the application of well-settled employment discrimination law and presents no issues of general importance. In their attempt, Petitioners have mischaracterized the law of the Eleventh Circuit as well as the decisions of the courts below. The District Court's entry of summary judgment and the Circuit Court's affirmance were proper applications of well-settled law and mandate that the Petition be denied.

I. Petitioners Have Mischaracterized the Eleventh Circuit's Summary Judgment Standard.

Petitioners base their first question presented on the premise that "[t]he Eleventh Circuit's standard for summary judgment in an employment discrimination case is inconsistent with the decisions of this Court." Petitioners'

Brief, p. 5. As discussed below, this statement is simply untrue; the Eleventh Circuit's standards mirror this Court's rulings regarding the proper standard for summary judgment in employment discrimination cases.

A. The Eleventh Circuit Follows this Court's Decisions in *McDonnell Douglas*, *Burdine*, *Hicks*, and *Reeves*.

Petitioners' assertion that the Eleventh Circuit standard for summary judgment conflicts with this Court's decisions is unsupported and simply false. In a case, such as this, where a plaintiff relies on circumstantial evidence of employment discrimination,[2] the Eleventh Circuit consistently follows the burden-shifting framework first articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, it is the plaintiff's initial burden to establish a *prima facie* case of discrimination. *Id.* The requirements of the *prima facie* case can vary depending on the context and "were never intended to be rigid, mechanized or ritualistic." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Furthermore, "[t]he burden of establishing a *prima facie* case is not onerous." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). By satisfying the elements of a *prima facie* case, a plaintiff creates an inference of discrimination because it eliminates the most likely legitimate explanations for an

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2. As discussed in more detail below, the Eleventh Circuit has previously applied the holding of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) in "mixed-motive" cases and required plaintiffs in such cases to produce direct evidence to avail themselves of that alternative burden shifting framework. Although this direct evidence requirement has recently been abrogated with respect to discrimination claims brought under Title VII by the Court's decision in *Desert Palace v. Costa*, this decision has no impact on ADEA claims and would not have impacted the Eleventh Circuit's analysis of this case.

employer's adverse action, such as a lack of qualifications or the absence of a job opening. *Id.* at 254.

If a plaintiff creates an inference of discrimination by establishing a *prima facie* case, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for the alleged adverse employment action in order to rebut that inference. *McDonnell Douglas*, 411 U.S. at 802. To do so, the employer must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255. The employer's burden at this stage is light, although it is required to articulate its nondiscriminatory reason with some specificity in order to afford the plaintiff "a full and fair opportunity to demonstrate pretext." *Id.* at 255-56. Furthermore, the employer's burden is merely one of production and "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253; *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

If a defendant presents evidence of a legitimate, nondiscriminatory reason for the adverse action, a plaintiff may still prevail by proving that the proffered justification was a pretext for discrimination. *Burdine*, 450 U.S. at 254-56. At this point in the analysis, the plaintiff's burden of showing pretext "merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." *Id.* at 256. To demonstrate pretext, a plaintiff must submit sufficient evidence to establish that the employer's stated reasons for its actions are false. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000) (holding that a "plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the

trier of fact to conclude that the employer unlawfully discriminated.").[3]

The Eleventh Circuit has consistently followed this framework and applied each of the decisions cited above on countless occasions, including this case.[4]

B. There is no "Falsity Requirement" Unique to the Eleventh Circuit.

Despite the fact that the Eleventh Circuit consistently adheres to this Court's decisions, and in an attempt to create an issue worthy of the Court's attention, Petitioners argue that their failure to survive summary judgment is the result of a "falsity requirement" that they imply is unique to the Circuit. Petitioners' Brief, p. 5. Petitioners fail, however, to cite any authority for their contention that the Eleventh Circuit's pretext analysis is a departure from this Court's jurisprudence.

Petitioners argue that, in the Eleventh Circuit:

> an employment discrimination plaintiff alleging intentional discrimination cannot survive a motion for summary judgment unless he or she can either (a) adduce substantial evidence that the employer's proffered explanation for the action in question is "false", or (b) offer "direct

3. Although this Court's decision in *Reeves* involved the review of a motion for judgment as a matter of law under Fed. R. Civ. P. 50, the Court noted that the standard for that rule "mirrors" the standard for summary judgment under Fed. R. Civ. P. 56. *Reeves*, 530 U.S. at 150.

4. *See, e.g., EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265 (11th Cir. 2002); *Cofield v. Goldkist, Inc.*, 267 F.3d 1264 (11th Cir. 2001); *Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001); *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000) (*en banc*); *Munoz v. Oceanside Resorts, Inc.*, 223 F.3d 1340 (11th Cir. 2000); *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997).

> evidence" that the employer acted with an impermissible motive.

Petitioners' Brief, pp. 5-6. As support, Petitioners cite a page from the Eleventh Circuit's decision in this case where it held that Petitioners failed to provide sufficient evidence to rebut Lucent's legitimate, nondiscriminatory reason (Appendix to Petition for Writ of Certiorari ("App."), p. 6a), a page from the District Court's Order where it simply defines pretext (App. 35a), and several pages from the District Court's Order in which that Court concluded that the Petitioners failed to introduce any direct evidence of age discrimination (App. 20a-25a).

In an attempt to overstate the importance and reviewability of their case, Petitioners are merely applying a different label to the well-established definition of pretext that originated with this Court. The use of the word "false" is by no means a departure from this Court's definition of pretext and, indeed, has been used by this Court to define a plaintiff's standard for demonstrating pretext. As this Court held in *Reeves*, "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is *false*, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148 (emphasis added).

As discussed in more detail below, Petitioners did not fail to survive summary judgment because the Eleventh Circuit applied an allegedly unique "falsity requirement." Petitioners did not survive summary judgment because they failed to introduce sufficient evidence to create a triable issue of fact regarding the validity of Lucent's legitimate nondiscriminatory reasons and they failed to establish that age was a motivating factor in any of Lucent's decisions.

II. The District Court and Eleventh Circuit Followed the Appropriate Summary Judgment Standard in This Case.

As discussed above, the Eleventh Circuit applies the burden-shifting framework first articulated in *McDonnell Douglas* and refined through subsequent decisions of this Court. The instant case was a routine application of that framework and represents no departure whatsoever from the well-settled law.

After a thorough review of the substantial record in this case, the District Court initially determined that Petitioners had failed to produce direct evidence of age discrimination. (App. 20a-25a). Petitioners do not challenge this finding, and this finding by no means doomed Petitioners' discrimination claims — it simply resulted in the Court's application of the *McDonnell Douglas* framework.[5] (App. 26a). Citing *McDonnell Douglas* and *Burdine*, *inter alia*, the District Court properly detailed the burden shifting involved in a discrimination case in which a plaintiff lacks direct evidence. *Id.* Consistent with *Reeves*, the District Court noted that "[i]f a plaintiff establishes a *prima facie* case and proffers sufficient evidence to allow a jury to disbelieve the employer's proffered reason for the action, that alone is enough to preclude summary judgment for the employer." (App. 27a).

The District Court applied this framework to the undisputed facts of the case. In doing so, it held that:

> Plaintiffs have presented enough evidence to raise a genuine issue of material fact as to each

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5. As discussed below, Petitioners may very well be arguing that the 1991 CRA modified or replaced the *McDonnell Douglas* framework. Any such argument is unavailing given this Court's own application of the framework in the years following the 1991 CRA. *See, e.g.*, *Hicks*, 509 U.S. 502 (1993); *Reeves*, 530 U.S. 133 (2000); *Swierkiewicz*, 534 U.S. 506 (2002).

> element of the *prima facie* case. Therefore, the burden shifts to Defendant to proffer legitimate nondiscriminatory reasons for Plaintiffs' bottom ten percent rankings, reassignments, and discharge or demotion.

(App. 32a).[6] The District Court then detailed the legitimate, nondiscriminatory reasons articulated by Lucent and turned its attention to the pretext stage of the analysis. (App. 33a-35a). As the District Court properly found, the BSCT Sales Managers evaluated all Account Executives and selected for the Bottom 10% those with the lowest relative qualifications given Lucent's future plans. (App. 12a-13a, 22a-23a). In this case, the evidence showed that Sales Manager Dunlap (age 52) chose Pike because of his pessimistic attitude, his focus on the NPG products that were being de-emphasized by Lucent and its customer, and his relative performance as compared to the other Account Executives he supervised. (App. 33a-34a, 38a; Dunlap Dec. ¶ 32-33; Dunlap Dep. pp. 61-64, 107-08). Likewise, Smith (age 48) and Dunlap chose Thomas because of his focus on NPG products, demonstrated resistance to learning the ONG product, and his relative lack of creativity and aggressiveness as compared to the other Account Executives he supervised. (App. 34a; Dunlap Dec. ¶ 32). Both Dunlap and Smith provided an ample basis for developing these opinions of Petitioners. (Smith Dep. pp. 51-64, 107-08, 123-26). The District Court also found that Sales Director Thrift (age 52) subsequently selected Pike for the reduction-in-force because of his relative lack of ONG knowledge and customer contacts as compared to Gomez. (App. 33a-34a).

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6. Petitioners' Brief repeatedly overstates the significance of the District Court's holding that they created a material issue of fact with respect to their *prima facie* cases. Petitioners even characterize the Court's requirement that they do more than establish their initial *prima facie* burden as a unique requirement of the Eleventh Circuit, rather than the well-settled law of this Court. (Petitioners' Brief, p. 3).

Consistent with the decisions of this Court and the Eleventh Circuit, the District Court explained that Petitioners could satisfy their pretext burden and survive summary judgment if they:

> cast doubt on the proffered reasons, submitting evidence that would permit a reasonable fact finder to conclude that the employer's reasons did not in truth motivate his conduct. In other words, Plaintiffs must demonstrate that a factfinder could determine that the employer's reasons lack credibility.

(App. 35a) (citations omitted). Petitioners, however, did not present evidence to rebut the reasons given by Dunlap, Smith and Thrift for the challenged decisions or demonstrate that these decision-makers did not have a good faith belief in their evaluations of Pike and Thomas. Instead, Petitioners merely offered their opinions of their past performance and they relied on statistics which did not bear on any of the challenged decisions.

In addition, the District Court had a mountain of evidence before it demonstrating that there was no age animus in these decisions. First, all of the decision-makers were older than Petitioners and were subject to the same Talent Assessment process as Petitioners. (App. 37a; Dunlap Dec. ¶ 27; Dunlap Dep. pp. 89-90). Second, although Petitioners presented evidence of sporadic alleged comments mentioning the word "youth" as a positive attribute (which were unrelated to the Talent Assessment process or Pike's reduction in force), the evidence shows that Lucent was actually increasing the number of older workers on the BCST. (White Expert Report pp. 4-5). At the time the alleged "purge" of older workers was occurring, the BSCT was actively recruiting older workers and five of the seven hires during this period were over age 40 and three were over age 50. (May Dec. ¶ 7). In addition, after the alleged age-biased Talent Process was

completed, the percentage of workers over age 40 on the BSCT had increased. (White Expert Report pp. 4-5).

Based on this evidence, the District Court concluded that they failed to meet their burden of proving pretext. (App. 38a). The Eleventh Circuit affirmed this decision, specifically rejecting Petitioners' argument that the District Court had held them to a higher standard or applied anything other than the appropriate burdens and analysis required by *McDonnell Douglas*. (App. 6a). Citing *Reeves*, the Eleventh Circuit held that:

> [t]he district court did not discount or exclude the plaintiffs' evidence from their *prima facie* case when considering whether the plaintiffs had presented sufficient evidence to find pretext. Instead, the district Court merely found that this evidence, though sufficient to establish the *prima facie* case, was not sufficient to permit a reasonable jury to find pretext.

(App. 6a) (internal citation to *Reeves* omitted).

In short, the District Court and the Eleventh Circuit held that, while Petitioner's evidence was sufficient to create a fact issue as to the existence of a *prima facie* case, it was insufficient as a matter of law to do anything more. These decisions therefore fall far short of the "compelling reasons" for review required by this Court.

III. This Court's Decision in *Desert Palace* is Not Applicable to This Case.

Faced with this routine application of the *McDonnell Douglas* framework and the resulting unlikelihood of review, Petitioners attempt to characterize this as a mixed-motive case and create an issue based on the Court's recent decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). This attempt is unavailing.

In *Desert Palace*, this Court addressed the issue of whether a plaintiff must present direct evidence of discrimination to obtain a mixed-motive jury instruction in a Title VII discrimination case. 123 S. Ct. at 2150 (2003). The Court began its analysis by looking to its decision in *Price Waterhouse v. Hopkins*, 409 U.S. 228 (1989), in which it first established the mixed-motive analysis. *Desert Palace*, 123 S. Ct. at 2150. In *Price Waterhouse*, the Court held that a Title VII plaintiff could establish liability when both legitimate and discriminatory reasons motivated an employment decision, but that an employer could invoke an affirmative defense and avoid all liability if it could prove it would have made the same decision absent the discriminatory reason. The Court divided, however, on what circumstances would shift the burden of proof from the plaintiff to the employer to prove that affirmative defense. Justice O'Conner's concurring opinion in *Price Waterhouse* espoused the view that "the burden of causation would shift to the employer only where a disparate treatment plaintiff [could] show by *direct evidence* that an illegitimate criterion was a substantial factor in the decision." *Desert Palace*, 123 S. Ct. at 2151 (internal quotations from *Price Waterhouse* omitted) (emphasis in original).

After reviewing this decision, the Court turned to the language of the Civil Rights Act of 1991 ("1991 CRA"), which modified and limited the affirmative defense established in *Price Waterhouse*. *Id.* at 2153. This review of § 107 of the 1991 CRA (codified at 42 U.S.C. § 2000e-2(m)) led the Court to conclude that Title VII does not require a plaintiff to produce direct evidence of discrimination to obtain a mixed-motive jury instruction. *Id.* at 2153-55. The Court then held that "[i]n order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice." *Id.* at 2155.

In their Brief, Petitioners assume, without explaining, that *Desert Palace*'s holding applies in this case (which involves alleged age discrimination under the ADEA). As discussed below, however, *Desert Palace* is inapplicable and the Eleventh Circuit's decision is not inconsistent with that decision.

A. *Desert Palace* is Not Applicable Because the 1991 CRA Amendments Did Not Affect the ADEA.

This Court held in *Desert Palace* that the 1991 CRA partially abrogated its decision in *Price Waterhouse* by eliminating the requirement that plaintiffs produce direct evidence of discrimination in mixed-motive cases under Title VII. The *Desert Palace* decision, however, rested entirely on the unambiguous language of § 107 and Congress' intent to abrogate *Price Waterhouse* with respect to *Title VII* claims. That section does not apply to the ADEA.

Although Congress partially overruled the Court's holding in *Price Waterhouse* with respect to race, color, religion, sex, and national origin discrimination claims under Title VII, it did not impact age claims under the ADEA. Indeed, in the twelve years since the enactment of the 1991 CRA, numerous Circuits have continued to apply *Price Waterhouse* in ADEA cases. *See DeMarco v. Holy Cross High School*, 4 F.3d 166, 172 (2d Cir. 1993) ("We see no basis for concluding that the new Title VII standard applies to the ADEA, since Congress could have amended the ADEA along with Title VII, but did not."); *Miller v. Cigna Corp.*, 47 F.3d 586, 599 n.10 (3d Cir. 1995) ("The substantive provisions of the 1991 CRA that amended Title VII did not amend the ADEA"); *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 429 n.4 (1st Cir. 2000) (noting that the federal courts faced with the issue have held that the changes made by the 1991 CRA do not apply in the ADEA context); *Lewis v. Young Men's Christian Assoc.*, 208 F.3d 1303 (11th Cir. 2000) (holding that the 1991 CRA is not applicable to the ADEA

and that mixed-motive age cases are therefore properly analyzed under *Price Waterhouse*); *Ziegler v. Delaware County Daily Times*, 128 F. Supp. 2d 790, 794 n.10 (E.D. Pa. 2001) (noting that provisions of the 1991 CRA did not apply to ADEA and that courts continue to analyze age claims under *Price Waterhouse*); *see also Pennington v. City of Huntsville*, 261 F.3d 1262, 1269 (11th Cir. 2001) (holding that *Price Waterhouse* remains good law in cases not expressly listed in 42 U.S.C. § 2000e-2(m), citing cases from the First, Second, Third, Fourth, and Eighth Circuits that hold the 1991 CRA does not even apply to retaliation claims brought under Title VII because they are not listed by the statute, and noting that all Circuits that have examined the issue have reached this conclusion).

Petitioners cannot claim that Congress' decision to partially abrogate *Price Waterhouse* with respect to Title VII, but not the ADEA, was the result of inadvertence or oversight. Indeed, Congress expressly referenced and modified the ADEA in other portions of the 1991 CRA. *See Lewis*, 208 F.3d at 1305. Furthermore, courts had applied *Price Waterhouse* to ADEA claims before 1991, putting Congress on notice that it would need to amend the language of the ADEA as well as Title VII if that was its intent. Finally, in the twelve years since the Act, Congress has made no similar efforts to modify the ADEA as it did Title VII. Accordingly, while the *Costa* decision may have a wide-ranging impact on Title VII discrimination claims, it has no impact on the ADEA or the proper resolution of this case.

B. Even if Applicable to the ADEA, *Desert Palace* Has No Effect on the Instant Case.

In addition, even if this Court's decision in *Desert Palace* were applicable to claims brought under the ADEA, that decision would have no effect on the instant case. Although Petitioners' Brief consistently overstates the weight and value of their evidence,[7] it remains clear that the District Court and Eleventh Circuit found only that Petitioners had created a fact issue with respect to their *prima facie* case, but nothing more. *See* App. 6a-7a, 30a-32a, 38a. The courts below never made any finding that age discrimination was a motivating factor in any of Lucent's decisions. The mere fact that Petitioners presented evidence sufficient to create an issue of fact with respect to their *prima facie* case is insufficient to invoke the mixed motive framework. Petitioners must offer stronger evidence to invoke the mixed-motive framework than the evidence needed to establish a *prima facie* case under *McDonnell Douglas*. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1181 (2d Cir.) ("In such a 'mixed-motives' case, the plaintiff must initially show more than the 'not onerous' *McDonnell Douglas - Burdine* factors."), *cert. denied*, 113 S. Ct. 82 (1992). The District Court and Eleventh Circuit both explicitly held that Petitioners here failed to do so, concluding that they had only satisfied their *prima facie* burden. (App. 6a-7a, 32a, 38a).

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7. *See* Petitioners' Brief at 1 (citing App. 30a and stating "the district court held that petitioners 'offer circumstantial evidence that could support an inference of intentional discrimination"); 2 (citing App 31a and stating "[t]he district court reiterated that the record evidence created an inference of intentional discrimination"); and 8 (citing App. 30a-31a and stating "the District Court repeatedly concluded that the plaintiffs' evidence 'could support an inference of intentional discrimination").

As noted above, Petitioners had no evidence that age was a motivating factor in the challenged decisions. Each of the relevant decision-makers was older than Petitioners and would have no reason to cooperate in an alleged "purge" of older workers. (App. 37a). Moreover, the evidence showed that the percentage of workers over age 40 on the BSCT increased at the time of this alleged purge. (White Expert Report pp. 4-5). In addition, Petitioners did not present evidence necessary to show that any younger Account Executives should have been selected for the Bottom 10% or the reduction-in-force instead of them. (App. 37a). In fact, when Petitioners were asked to name people who should have been ranked below them, Petitioners identified numerous individuals who were over age 40, and others who were even older than them. (App. 37a). Although Petitioners relied heavily on statistics and stray remarks, the lower courts properly found that they were all unrelated to the decisions at issue and were certainly insufficient to create a fact issue regarding the motivation behind the challenged decisions.

Petitioners are essentially reduced to arguing that by merely establishing a *prima facie* case, they are entitled to a mixed-motive analysis and that the courts below therefore erred. This is clearly not the case, as the result would be the denial of summary judgment in any case where an employee over the age of 40 is replaced by someone younger, regardless of the circumstances and in the complete absence of any evidence of discrimination.

The undisputed evidence simply does not support a mixed-motive analysis or a finding that age was a motivating factor in Lucent's decisions. *Desert Palace* is therefore inapplicable. *See Desert Palace*, 123 S. Ct. at 2151 n.1 (expressly avoiding the issue of whether § 107 ever applies outside of the mixed-motive context).

IV. The Courts Below Properly Dismissed Petitioners' Collective Action Claims for Failing to File the Requisite Consents.

As noted above, the Eleventh Circuit properly affirmed the dismissal of Petitioners' claims and there is no basis for reviewing that decision. For that same reason, the Eleventh Circuit's affirmance of the dismissal of their collective action allegations is moot and should not be reviewed since Petitioners did not raise meritorious claims. Nevertheless, Petitioners contend that, even though they never sought to pursue this case as a collective action (other than by putting conclusory allegations in their Complaint), the Court should review the Eleventh Circuit's decision.

Petitioners contend that the District Court and Eleventh Circuit erred in dismissing their collective action claims despite the fact that they failed to file opt-in consents as required by 29 U.S.C. § 256. Petitioners argue that § 256 does not apply to collective actions under the ADEA and that they therefore were not required to file their consents. Petitioners concede that the Eleventh Circuit requires the filing of a timely consent, but argue that decisions issued by the Third and Eighth Circuit have held that the 1991 CRA has abrogated such a requirement.

Petitioners' argument is based on a misinterpretation of the 1991 CRA and its effect on collective actions under the ADEA. In that 1991 CRA, Congress amended the ADEA to change the time period in which a plaintiff may file suit. Specifically, the 1991 CRA required future plaintiffs to comply with Title VII's administrative prerequisites, including filing a Charge of Discrimination. In doing so, Congress deleted 29 U.S.C. § 255 from the FLSA provisions that are applicable to the ADEA. By reducing the statute of limitation to a 90-day period, Congress made the two and three-year statutes of limitation contained in § 255 obsolete. Petitioners apparently concede that Congress did not

expressly delete § 256 from the ADEA as part of the 1991 CRA. They argue, however, that the mere fact that § 256 references § 255 makes it obsolete in the wake of the 1991 CRA. *See* Brief of Appellants, p. 61.

The reasoning of the District Court and Eleventh Circuit demonstrates the weakness of Petitioners' argument. As the District Court properly observed, the ADEA incorporates the collective action provisions of the FLSA, including 29 U.S.C. § 256, which governs "when an action is commenced." (App. 44a); *see also Grayson v. Kmart Corp.*, 79 F.3d 1086, 1105-06 (11th Cir. 1996) (expressly holding that ADEA incorporates provisions of 29 U.S.C. § 256). Under § 256, an ADEA collective action is commenced only when a named plaintiff files both a complaint and a written consent to become a party plaintiff. *Id.* at 1106. Neither the language of the 1991 CRA, nor any case law interpreting it, suggest that Congress intended to do anything more than modify the ADEA statute of limitations. Indeed, in modifying the statute of limitations in the Act, Congress deleted only the ADEA's reference to 29 U.S.C. § 255 — it did not delete or otherwise disturb the applicability of the collective action procedures articulated in 29 U.S.C. § 216(b) to ADEA claims. *See* 29 U.S.C. § 626(b), (e); *Little v. Aid Ass'n for Lutherans*, 62 F.3d 257, 259 (8th Cir. 1995); *Browning v. AT&T Paradyne*, 120 F.3d 222, 223 (11th Cir. 1997). As the District Court noted:

> [t]he mere modification of the statute of limitations for ADEA claims did not affect the procedure, provided in 29 U.S.C. § 256, for commencing a collective action. FLSA's collective action procedures were applied to ADEA collective actions prior to the 1991 amendments; therefore, if Congress wanted to provide a different rule for commencing an ADEA collective action, they could have done so.

(App. 44a). The District Court and Eleventh Circuit in this case simply joined the overwhelming precedent supporting the

proposition that a named plaintiff in an FLSA collective action does not commence the collective action, and therefore does not toll the statute of limitations, until he files his complaint and his written consent. The Court, therefore, should deny the Petition for Review of this case.

CONCLUSION

For all of the foregoing reasons, this case presents no issue that merits this Court's attention or review, and the Petition should therefore be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 2 2 2003
OFFICE OF THE CLERK

No. 03-199

In the Supreme Court of the United States

JERRY R. PIKE, PATRICK A. THOMAS,
Individually and on behalf of others
similarly situated,
Petitioners,

v.

LUCENT TECHNOLOGIES, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Requirement That an Employment Discrimination Plaintiff Either Introduce Direct Evidence or Demonstrate the Falsity of the Employer's Proffered Explanations Is Inconsistent with this Court's Decision in Desert Palace v. Costa and with Decisions in Several Courts of Appeals

Respondent summarizes at length the exculpatory evidence which it offered. The district court opinion, on the other hand, describes in some detail the inculpatory evidence which that court noted "could support an inference of intentional discrimination." (Pet. App. 30a-31a). The question of law raised by the petition is whether the courts below utilized the wrong legal standard in deciding whether this conflicting evidence warranted summary judgment. Both courts below acted without the benefit of this Court's decision in Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003).

Respondent's description of the legal standard applied by the courts below is entirely consistent with the Petitioners' characterization of the decisions of those courts. First, respondent agrees that in the Eleventh Circuit that a plaintiff cannot establish the existence of intentional discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), unless he or she can prove that the employer's explanation was false. "To demonstrate pretext, a plaintiff must submit sufficient evidence to establish that the employer's stated reasons for its actions are false." (Br. Opp. 16); compare Petition 6 ("of the two methods permitted by the Eleventh Circuit to prove intentional discrimination, one requires that the plaintiff prove that an employer's proffered

explanation is 'false.'"). Second, absent proof of falsity, the plaintiff in the Eleventh Circuit can only avoid summary judgment by adducing "direct evidence of . . . discrimination." (Br. Opp. 19); compare Petition 8 ("The only alternative method of proof permitted by the Eleventh Circuit is 'direct evidence.'")

Given those two undisputed pillars of Eleventh Circuit jurisprudence, summary judgment is legally required in any mixed-motive case unless the plaintiff has direct evidence. Respondent does not question that inexorable meaning of the decision below. See Br. Opp. 26 (A mixed motive case requires "stronger evidence" than other cases.)

Respondent insists that this direct evidence requirement is consistent with Desert Palace because that case arose under Title VII, not the ADEA. (Br. Opp. 24-25). Desert Palace, however, did not fashion a special rule for Title VII cases. To the contrary, the Court held that Title VII cases must conform to the "conventional rule of civil litigation," in which a plaintiff proves his case by a preponderance of the evidence using either direct or circumstantial evidence. The Court observed that direct and circumstantial evidence are treated "alike" and emphasized the critical role that circumstantial evidence has traditionally served in "discrimination cases." 123 S. Ct. at 2154. Emphasizing the breadth of the principle that "the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence," the Court cited Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), an ADEA case; Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957), a case under the Federal Employers' Liability Act; and various criminal law authorities. Id.

Respondent contends that the Eleventh Circuit's falsity requirement is mandated by this Court's decision in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), quoting the following passage from Reeves:

> [A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.

530 U.S. at 148, quoted at Br. Opp. 16. But Reeves clearly holds only that proof of falsity is one method of proving unlawful discrimination, not that proof of falsity is the exclusive legally sufficient method of doing so. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." Reeves, 530 U.S. at 147 (Emphasis added).

The Eleventh Circuit's March 2003 decision is clearly inconsistent with this Court's June 2003 decision in Desert Palace. Even in the wake of Desert Palace, the courts of appeals have remained divided about the issues in this case. Desert Palace rejected in unequivocal and emphatic terms the distinction that had been drawn by many courts of appeals between "direct evidence" and circumstantial evidence. 123 S. Ct. at 2154. Yet following Desert Palace, a number of circuits continue to insist on just such a distinction, and persist in awarding summary judgment because a plaintiff's evidence of unlawful intent was not "direct."[1] The Ninth

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[1] E.g. Cushman-Lagerstrom v. Citizens Insurance Co. of America, 2003 WL 21774017 *8-*9 (6th Cir., July 30, 2003)(supervisor's "disparaging remarks" remarks about female workers were "offensive" but did not meet the Sixth Circuit's

Circuit, on the other hand, has followed this Court's decision in Desert Palace and refused to treat direct evidence as necessarily more probative than circumstantial evidence[2].

Similarly, the courts of appeals since Desert Palace have been divided about whether, absent direct evidence, a plaintiff must prove that an employer's proffered explanation is false. The District of Columbia Circuit has held that, even absent direct evidence, proof of falsity is "[o]ne way" to prove under

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definition of "direct evidence"); Moody v. United States Secretary of the Army, 2003 WL 21983014 *2 (5th Cir., Aug. 21, 2003)(repeated references to plaintiff as "granny" and "old woman" did not meet Fifth Circuit's definition of "direct evidence", but "merely evidence animus directed at [plaintiff] based on her age"); Murphy v. University of Cincinnati, 2003 WL 21774157 *6 (remarks by supervisor that he objected to hiring women not "direct evidence" because plaintiff's complaint alleged discrimination in dismissal not in hiring), *10 (dissenting opinion)(emphasizing probative value of evidence) (6th Cir., July 29, 2003); Paasewe v. Ohio Arts Council, 2003 WL 22017539 *2 (6th Cir., Aug. 25, 2003)("racially derogatory comment" did not meet Sixth Circuit definition of "direct evidence"); Read v. BT Alex Brown Inc., 2003 WL 21754966 *6 (recommendation that firm "hire a young man just out of college who will . . . show these girls . . . how to work" not sufficiently unambiguous to constitute direct evidence), *6 n. 13 (rejecting broader definition of direct evidence in earlier panel decision)(5th Cir., July 30, 2003); Estades-Negroni v. The Associates Corp. of North America, 2003 WL 22244952 (1st Cir., Oct. 1, 2003)(describing and applying First Circuit's definition of "direct evidence"); Lassetter v. Strategic Materials, Inc., 2003 WL 21754986 * 4 n. 7 (5th Cir., July 29, 2003)(describing and applying four-part Fifth Circuit definition of "direct evidence").

[2] Bell v. Clackamas County, 341 F.3d 858, 868 (9th Cir. 2003)(quoting Desert Palace).

McDonnell Douglas the existence of a discriminatory motive[3]. The Seventh Circuit has held direct evidence and falsity are not the exclusive methods for proving intentional discrimination, noting that other types of circumstantial evidence may suffice, such as "ambiguous statements", "suspicious timing", "behavior toward other employees", dissimilar treatment of similarly situated other workers, "and so on".[4] The Fifth Circuit, on the other hand, insists that in the absence of direct evidence a plaintiff must prove the falsity of an employer's proffered explanation; indeed, if the employer proffers five different explanations, summary judgment is required unless the plaintiff shows that all of those explanations are false[5]. In the Sixth Circuit a plaintiff must show either that a proffered reasons had "no basis in fact", or that they "did not actually motivate [the employment action]"[6]. That requirement, by definition, could not be met in a mixed motive case where some non-discriminatory purpose was indeed present. Thus the Sixth Circuit's formulation makes clear the nature and consequence of the falsity rule utilized in the Fifth, Sixth and Eleventh Circuits--summary judgment is unavoidable in any mixed-motive case in which the plaintiff does not have direct evidence. This

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[3] Lathram v. Snow, 366 F.3d 1085, 1088 (D.C. Cir. 2003).

[4] Volovsek v. Wisconsin Dept. of Agriculture, Trade and Consumer Protection, 2003 WL 22146393 (7th Cir., Sept. 18, 2003).

[5] Lassetter v. Strategic Materials Inc., 2003 WL 21754986 (5th Cir., July 29, 2003).

[6] Anthony v. BTR Automotive Sealing Systems, Inc., 339 F.3d 506, 516 (6th Cir. 2003)(emphasis omitted); Seay v. Tennessee Valley Authority, 339 F.3d 454, 463 (6th Cir. 2003).

continued insistence on direct evidence is utterly inconsistent with this Court's decision in Desert Palace.

II. There Is an Undisputed Inter-circuit Conflict Regarding Whether an ADEA Collective or Class Action Cannot Proceed Unless the Name Plaintiff First "Opts In" to His Own Lawsuit

Respondent does not deny the existence of an inter-circuit conflict regarding ADEA collective or class actions. The Eleventh Circuit holds that such an action cannot proceed unless the named plaintiff files with his own complaint a separate written consent to being a plaintiff in his own lawsuit. This rule imposes upon the named plaintiff in such an action a requirement that he opt into his own lawsuit, and do so at the beginning of the action.

As we noted in the petition, several circuits have refused to apply to ADEA actions any requirement that such opt-in agreements be executed at the outset of the litigation. In Sperling v. Hoffman-La Roche, Inc., 24 F.3d 463, 466 et seq., (3d Cir. 1994), the Third Circuit expressly held that the opt-in provisions of the Fair Labor Standards Act do not apply to actions under the ADEA. Respondent does not deny that the Eleventh Circuit's rule conflicts with the rule in other circuits, but merely argues that the court below--not the other circuits--has correctly interpreted the ADEA. At this juncture, however, it is the existence of this inter-circuit conflict which warrants review by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgment and opinion of the court of appeals. In the alternative, the Court should grant the write, vacate the decision below, and remand the case for reconsideration in light of Desert Palace Inc. v. Costa.

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